CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 61

OKLAHOMA PRESS PUBLISHING COMPANY,
PETITIONER,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STACTES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 16, 1945.

CERTIORARI GRANTED MAY 21, 1945.

United States Circuit Court of Appeals

TENTH CIRCUIT.

No. 3036.

OKLAHOMA PRESS PUBLISHING COMPANY,
a Corporation, APPELLANT,

vs.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor, Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR EASTERN DISTRICT OF OKLAHOMA

FILED JULY 19, 1944.

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 3036.

OKLAHOMA PRESS PUBLISHING COMPANY, a Corporation, APPELLANT,

vs.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor, APPELLEE.

Statement of Points on Which Appellant Intends to Rely.

1. The trial court was without jurisdiction to enter any order in this cause.

2. The Administrator had no jurisdiction over Appellant's affairs.

3. The attempted application of the Act to the business of Appellant violates its rights as guaranteed by the First Amendment to the Constitution of the United States.

4. The attempted application of the provisions of Section 11(a) and (c) of the Act to Appellant's business is without authority, under the Act, and violates Appellant's rights as guaranteed by the Fourth Amendment to the Constitution of the United States.

5. The attempted application of the provisions of Section 11(a) and (c) of the Act to Appellant's business also violates its rights as guaranteed by the Fifth Amendment to the Constitution of the United States.

6. By reason of the provisions of Section 13(a) (8) of the Act, the attempted application of any of the provisions of the Act with respect to wages or hours of employees of Appellant violates its rights as guaranteed by the Fifth Amendment to the Constitution of the United States.

7. By reason of the provisions of Section 15(a) (1), (2) and (5), and those of Section 16(a) and (b), the Order requested by the Administrator, if granted, would violate the rights of Appellant as guaranteed by the Fifth Amendment to the Constitution of the United States.

8. The Administrator is without authority to apply the provisions of Sections 6 and 7 of the Act to employees of Appellant engaged in bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesmen, because the provisions of Section 13(a) (1) of the Act exempt such employees from the provisions of Sections 6 and 7 of the Act.

9. The Administrator is without authority to apply the provisions of Sections 6 and 7 of the Act to Appellant, because of the provisions of Section 13(a) (2) of the Act.

10. Appellee's application filed in the trial court was insufficient upon which to base any order against Appellant.

11. Under the undisputed evidence and admissions, the trial court erred in entering its order against Appellant, and in failing to dismiss the application of the Appellee.

12. Under the admissions and undisputed evidence, the Act has no application to the newspaper publishing business of Appellant.

13. The trial court erred in its Conclusion of Law number I.

14. The trial court erred in its Conclusion of Law number II.

15. The trial court erred in its Conclusion of Law number III.

16. The trial court erred in entering its final order of June 12, 1944.

ELISHA HANSON,
JOSEPH C. STONE,
CHAS. A. MOON,
Attorneys for Appellant.

Certificate of Service.

I, Chas. A. Moon, attorney for Appellant herein, hereby certify that on this 17th day of July, 1944, I mailed a true and correct copy of the foregoing Designation of Points on which Appellant Intends to Rely, to each of the following named attorneys of record for Appellee, at their respective addresses, to-wit:

To—Douglas B. Maggs, Solicitor, Office of the Solicitor, U. S. Department of Labor, Washington, D. C.

Archibald Cox, Associate Solicitor, Office of the Solicitor, U. S. Department of Labor, Washington, D. C.

Llewellyn B. Duke, Regional Attorney, U. S. Department of Labor, Rio Grande National Bldg., Dallas, Texas.

Harry Campbell, Jr., Associate Attorney, U. S. Department of Labor, Rio Grande National Bldg., Dallas, Texas.

CHAS. A. MOON.

Filed July 19, 1944. Robert B. Cartwright, Clerk.

Stipulation to be Included as Part of Appeal Record to be Printed.

It is hereby stipulated and agreed by and between the parties in the above styled cause that the following admissions made in open court on March 9, 1944 by Appellant herein be included as part of the Appeal Record to be Printed:

We send complimentary to some of the service men boys and men in the United States Army service outside of this state and in foreign countries complimentary copies of the paper. We state in the affidavit the number. My recollection is 123 of the Phoenix and 17 Times-Democrat, and for those we make no charge against anyone and we receive no compensation of any kind from anyone. In addition to that we publish, of course, foreign advertising and after our publications are made we send daily I think it is 36 copies of

the Phoenix an approximate average daily 36 Phoenix and 31 Times-Democrat, to our representatives in other states who in turn deliver them to these foreign advertisers. Of course, the daily mailing of those papers fluctuates in number but the approximate average daily number is 36 and 31, and for those we make no charge and receive no compensation from anyone.

Dated this 2nd day of August, 1944.

J. C. STONE,
CHAS. A. MOON,
Attorneys for Appellant, Oklahoma Press Publishing Company, a corporation.
DOUGLAS B. MAGGS, Solicitor,
BESSIE MARGOLIN, Assistant Solicitor,
LLEWELLYN B. DUKE, Regional Attorney,
Attorneys for Appellee, L. Metcalfe Walling, Administrator of the Wage and Hour Division, U. S. Department of Labor.

Filed August 5, 1944. Robert B. Cartwright, Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA.

PLEAS AND PROCEEDINGS BEFORE THE HONORABLE EUGENE RICE, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA, PRESIDING IN THE FOLLOWING ENTITLED CAUSE:

In the Matter of the Application of

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor for an order requiring the production of documentary evidence by the OKLAHOMA PRESS PUBLISHING COMPANY, a corporation, pursuant to subpoena.

No. 1166-Civil.

Application to Compel the Production of Documents and Records.

To the United States District Court for the Eastern District of Oklahoma:

2 The petitioner, L. Metcalfe Walling, Administrator, Wage and Hour Division, United States Department of Labor, pursuant to the Fair Labor Standards Act of 1938 (Public No. 718, 75th Congress, 52 Stat. 1060, U. S. C., Title 29, Sec. 201, et seq.), hereinafter referred to as the Act, respectfully shows and alleges that:

1. The petitioner, L. Metcalfe Walling, herein referred to as the Administrator, is the Administrator of the Wage and Hour Division, United States Department of Labor. The Administrator or his designated representatives are empowered by virtue of Section 11(a) of the Act to
3 investigate, enter, and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of the Act, or which may aid in the enforcement of the provisions of the Act. By virtue of Section 9 of the

Act, the provisions of Sections 9 and 10 of the Federal Trade Commission Act of September 26, 1914, as amended, U. S. C., Title 15, Sections 49 and 50 (relating to the attendance of witnesses and the production of books, papers, and documents) are made applicable to the jurisdiction, powers, and duties of the Administrator, and the Administrator has the power to issue and cause to be served upon any person a subpoena requiring the production of books, documents, records, and papers relating to any matter under investigation;

2. Jurisdiction to issue the order hereinafter prayed for is conferred upon this Court by virtue of Section 9 of the Federal Trade Commission Act (made applicable by Section 9 of the Fair Labor Standards Act as aforesaid) which empowers any of the District Courts of the United States within the jurisdiction of which an investigation is carried on, in case of a refusal to obey a subpoena to any corporation or other person, to issue an order requiring such corporation or other person to produce the books, documents, records, and papers designated in the subpoena. The investigation, in the course of which the subpoenas duces tecum were issued by the Administrator and served, as hereinafter set forth, is being conducted in the Eastern District of Oklahoma within the jurisdiction of this Court;

3. At all times hereinafter referred to, the Oklahoma Press Publishing Company of Muskogee, Oklahoma, hereinafter designated as the company, was and is a corporation organized and existing under and by virtue of the
4 laws of the State of Oklahoma, having its principal office and place of business located in Muskogee, Oklahoma, within the jurisdiction of this Court;

4. On information and belief, Franklin E. Katterjohn is the business manager of the company;

5. On information and belief, at all times hereinafter referred to, the company has been engaged in its said place of business in interstate commerce and in the production of goods for interstate commerce in that it publishes two daily newspapers known as the Muskogee Daily Phoenix (morning) and the Muskogee Times-Democrat (evening), and receives and sends daily news, intelligence, and com-

munications in interstate commerce, and transports, ships and delivers goods produced by it from points within the State of Oklahoma to points without the State of Oklahoma;

6. The Administrator having reasonable grounds to believe that the company in its business as above described at its said place of business in Muskogee, Oklahoma, has been and was, violating the provisions of Sections 6, 7, 11(c) [and the regulations pursuant thereto (known as Part 516, as amended, Title 29, Chapter V, Code of Federal Regulations, Part 516), a copy of which, together with the amendments, is attached hereto, marked Exhibit "A" and made a part hereof], 15(a)(1), 15(a)(2), and 15(a)(5) of the Act; and deeming investigation necessary and appropriate to determine whether the company has violated any provisions of the Act, and deeming an investigation necessary and appropriate as aiding in the enforcement of the provisions of the Act, Erle P. Bryan, a designated representative of the Administrator, entered said place of business for the purpose of making an investigation as provided in Section 11(a) of the Act;

7. The company refused to allow and permit the said Erle P. Bryan to make any inspection of its said records or to make any transcriptions thereof, and otherwise hindered him in his said investigation as is more fully set forth in the affidavit of the said Erle P. Bryan attached hereto, marked Exhibit "B" and made a part hereof;

8. Thereafter a subpoena duces tecum was issued by the said Administrator under the powers conferred upon him by Section 9 of the Act, requiring the company to appear before Ernest M. Worley, an officer of the Wage and Hour Division, at Room 231, United States Post Office Building, in the City of Muskogee, Oklahoma, on the 17th day of November, 1943, at 10:00 A. M. to produce specific books, papers, documents and records of the company, and the said *subpena* was served upon the company by delivering a duplicate original copy of the said *subpena* duces tecum to Franklin E. Katterjohn, business manager of the company, on November 3, 1943, at the office of the company in Muskogee, Oklahoma. A copy of the said *subpena* duces tecum,

with the return endorsed thereon, is attached hereto, marked Exhibit "C" and made a part hereof;

9. At all times herein stated, on information and belief, the aforesaid Franklin E. Katterjohn, business manager above mentioned, is and was in charge of the company's said place of business and has, and has had, custody and control of the books, records, and documents described in the said *subpena* duces tecum.

10. At 10:00 A. M. on the 17th day of November, 1943, the said Ernest M. Worley, an officer of the Wage and Hour Division, as provided in said *subpena,* was present at Room 231 in said United States Post Office Building in Muskogee, Oklahoma, for the purpose of examining the books, records, papers and documents, the production of which was required by the said *subpena,* but the said Franklin E. Katterjohn and the company failed, neglected and refused to appear at the said time and place before the said officer or to produce the said books, records, documents and papers, as is more fully set forth in the affidavit of the said Ernest M. Worley, attached hereto and marked Exhibit "D";

6 11. All of the books, records, papers, and documents required to be produced by the *subpena* duces tecum were at the time of the issuance of said *subpena* duces tecum, and are now, relative, material, and appropriate to determine whether the company has violated Sections 6, 7, 11(c), 15(a)(1), 15(a)(2), and 15(a)(5) of the Act, and will aid in the enforcement of the provisions of the Act;

12. The books, records, papers and documents required to be produced by the said *subpena* duces tecum were at the time of the issuance and service of said *subpena,* and are now, in the possession, custody, and control of the company;

13. The petitioner respectfully appeals to this Honorable Court for an order directing the Oklahoma Press Publishing Company of Muskogee, Oklahoma, to appear before him or the said authorized representative and to produce the books, records, documents and papers as requested by the said *subpena* duces tecum, as set forth above at a time and place to be fixed in said order.

Wherefore, petitioner respectfully prays:

(a) That an order be issued forthwith directing the said Oklahoma Press Publishing Company of Muskogee, Oklahoma, to appear and show cause upon a day certain to be fixed by the said order why an order should not issue requiring said company to produce the books, records, documents and papers required by the *subpena* duces tecum before the petitioner, or one or more of his authorized representatives, at such time and place as this Court may order;

(b) That upon the return of the order directing the Oklahoma Press Publishing Company at Muskogee, Oklahoma, to appear and show cause as above set forth,
7 an order issue requiring said company to produce the books, records, documents and papers required by said *subpenas* duces tecum before the petitioner, or one or more of his authorized representatives at such time and place as this Court may order;

(c) That the petitioner have such other and further relief as may be necessary or appropriate.

DOUGLAS B. MAGGS, Solicitor;
ARCHIBALD COX, Associate Solicitor;
LLEWELLYN B. DUKE, Regional Attorney;
HARRY CAMPBELL, JR., Associate Attorney, United States Department of Labor,
Attorneys for Administrator.

(Duly verified by Harry Campbell, Jr.)

Filed Jan. 29, 1944. John H. Pugh, Clerk, U. S. District Court.

Exhibit B.

State of Arkansas, County of Logan, ss.

25 Erle P. Bryan, of lawful age, being first duly sworn, on oath says:

That he is an Inspector of the Wage and Hour Division, United States Department of Labor, and is an authorized representative of L. Metcalfe Walling, Administrator of

the Wage and Hour Division, United States Department of Labor, and is authorized to investigate and gather data regarding the wages, hours and other conditions and practices of employment in any industry subject to this Act, and to enter and inspect such places and such records (and make such transcriptions thereof), question such employees and investigate such facts, conditions, practices or matters as he may deem necessary or appropriate to determine whether any person has violated any provisions of the Fair Labor Standards Act of 1938 or which may aid in the enforcement of the provisions of the said Act;

That he, accompanied by Inspector-in-Charge John C. Wilson, went to the office of the Oklahoma Press Publishing Company, the publisher of the Muskogee Daily Phoenix and of the Muskogee Times Democrat, in Muskogee, Oklahoma, on June 3, 1943 and requested the production of the books, records, documents and papers as are set forth in the subpoena duces tecum attached to the Application for an Order to Compel the Production of Documents and Records. That he contacted Mr. Franklin E. Katterjohn, the business manager of the Oklahoma Press Publishing Company and was advised by Mr. Katterjohn that no decision as to whether the books and records might be shown to him and to Inspector-in-Charge Wilson could be reached until the return of Mr. Tams Bixby Jr., the President of the Oklahoma Press Publishing Company on June 4;

26 On June 4, 1943, he and Mr. Wilson returned to the office of the Oklahoma Press Publishing Company and requested of Mr. Bixby and Mr. Katterjohn the production of the books, records, documents and papers material to the making of an investigation of the operations of the company. That the said Mr. Tams Bixby, Jr. and Mr. Franklin E. Katterjohn refused access to such books, records, documents and papers to Mr. Wilson and to this affiant.

Further deponent saith not.

ERLE P. BRYAN.

Subscribed and sworn to before me this 27th day of January, 1944. Ruth Lyman, Circuit Clerk. (Seal).

Exhibit C.

United States of America
Department of Labor
Wage and Hour Division

Subpoena Duces Tecum

To Oklahoma Press Publishing Company, 214 Wall Street, Muskogee, Oklahoma.

27 At the instance of the Administrator, Wage and Hour Division, Department of Labor, you are hereby required to appear before Ernest M. Worley of the Wage and Hour Division, Department of Labor, at Room 231, United States Post Office Building in the City of Muskogee, Oklahoma on the 17th day of November 1943, at 10:00 o'clock A. M. of that day, to testify In the Matter of Oklahoma Press Publishing Company involving an investigation pursuant to the provisions of Sections 9 and 11(c) of the Fair Labor Standards Act of 1938 regarding complaints of violations by said compay of Sections 6, 7, 11(c), 15(a) (1), 15(a) (2) and 15(a) (5) of the Act.

And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents:

All of your books, papers and documents showing the hours worked by and wages paid to each of your employees between October 28, 1938, and the date hereof, including all payroll ledgers, time sheets, time cards and time clock records, and all your books, papers and documents showing the distribution of papers outside the State of Oklahoma, the dissemination of news outside the State of Oklahoma, the source and receipt of news from outside the State of Oklahoma, and the source and receipt of advertisements of nationally advertised goods.

Fail Not At Your Peril.

In Testimony Whereof, the seal of the Department of Labor, is affixed hereto, and the Administrator of the Wage and Hour Division, of said Department of Labor, has hereunto set his hand at New York this 14 Day of October, 1943.

(Seal) L. METCALFE WALLING.

Return of Service.

I hereby certify that a duplicate original of the within *subpena* was duly served in person Mr. Franklin E. Katterjohn, Business Manager, 214 Wall St., Muskogee, Okla., Time 11:43 A. M. on the person named herein on November 3, 1943.

JOHN C. WILSON,
Senior Inspector-in-Charge.

Exhibit D.

State of Oklahoma, County of Oklahoma ss.

28 Ernest M. Worley, of lawful age, being first duly sworn, on oath says:

That he is an officer of the Wage and Hour Division, United States Department of Labor, and is in charge of the Field Office of said Division located in room 1004 Petroleum Building, Oklahoma City, Oklahoma;

That he is the same Ernest M. Worley named in the subpoena duces tecum served upon the Oklahoma Press Publishing Company, of Muskogee, Oklahoma, on November 3, 1943, and directing that the said Oklahoma Press Publishing Company appear before this deponent at room 231 U. S. Post Office Building, Muskogee, Oklahoma, at 10:00 a. m. on November 17, 1943 and produce the books, records, *ducments* and papers specified in said subpoena:

That he was present in room 231 U. S. Post Office Building, Muskogee Oklahoma on the said 17th day of November, 1943 at 10:00 a. m. as specified in said subpoena, being there present at that time for the purpose of receiving, examining and making transcriptions of books, records, documents and papers required by the said subpoena from the said Oklahoma Press Publishing Company;

That he awaited the appearance of the company or its representatives for the production of said books, records, documents and papers, as required by the aforesaid subpoena duces tecum by the said company or its representatives and the said company and its representatives failed,

neglected and refused to appear in answer to the said subpoena and did fail, neglect and refuse to produce the books, records, papers and documents specified in the aforesaid subpoena duces tecum;

That thereafter he received a letter addressed to him by the said Oklahoma Press Publishing Company, a copy of which is attached hereto, advising that the said Oklahoma Press Publishing Company would not appear as required by the said subpoena for the reasons set out in the said letter.

29 Further deponent saith not.

ERNEST M. WORLEY.

Subscribed and sworn to before me this 20th day of January, 1944. Dorothy Warren, Notary Public. (Seal)

Tams Bixby, Jr.,
President & Treasurer
Tams Bixby, III
Vice President
Lee Diwine
Secretary

Franklin E. Katterjohn
Business Manager
Paul A. Bruner
Managing Editor

Oklahoma Press Publishing Company
Muskogee, Oklahoma

Nov. 15, 1943

Mr. *Earnest* M. Worley, Room 231, U. S. Post Office Building, Muskogee, Oklahoma.

30 Dear Sir: The Oklahoma Press Publishing Company has been served with *Subpena* Duces Tecum to appear before you, at Room 231, U. S. Post Office Building, in the City of Muskogee, Oklahoma, on November 17, 1943, at 10:00 o'clock A. M., and bring its records, books, etc., for inspection at that time.

You are hereby respectfully advised that the Company will fail to appear at the time and place designated, for the reason that it has been advised by counsel that the law under which the subpoena was issued and the appearance required does not apply to the Oklahoma Press Publishing Company, which is the owner and publishers of the two Muskogee daily newspapers.

It is not our intention to violate any law, and in fact, although we have been advised that the law under which the subpoena was issued does not apply to newspaper publishers, we have attempted in good faith to conduct our business in accordance with the rules and regulations issued under the law in the interest of good employer-employee relations.

For your information, you are advised that we do not have any out-of-state subscribers for our newspapers, and that we have had no such out-of-state subscribers since the first day of June, 1939.

You, of course, understand that in failing to appear, under advice of counsel, we mean no disrespect to you personally, nor to the law.

Very truly yours,

FRANKLIN E. KATTERJOHN,
Business Manager.

FEK:H

Order to Show Cause.

31 Upon application of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, filed herein on the 29th day of January, 1944, duly verified by Harry Campbell, Jr., upon the 28th day of January, 1944, it is hereby

Ordered by the Court that the respondent, the Oklahoma Press Publishing Company, a corporation, owner and publisher of the Muskogee Daily Phoenix and the Muskogee Times-Democrat, of Muskogee, Oklahoma, on the 18th day of February, 1944, at 10:00 A. M. of that day, or as soon thereafter as counsel can be heard, why an order should not issue requiring the respondent, the Oklahoma Press Publishing Company, a corporation, to appear before L. Metcalfe Walling, Administrator, Wage and Hour Division, United States Department of Labor, or an officer of the Wage and Hour Division, designated by him at such time and place as this Court may order and to produce the following books, papers and documents:

All books, papers and documents showing the hours

worked by, and wages paid to, each of the employees of the said Oklahoma Press Publishing Company engaged in the publication and distribution of the Muskogee Daily Phoenix and the Muskogee Times-Democrat between October 24, 1938, and the date hereof, including all pay roll ledgers, time sheets, time cards and time clock records, and all books, papers and documents showing the distribution
32 of copies of the said Muskogee Daily Phoenix and the Muskogee Times-Democrat outside the State of Oklahoma, the dissemination of news outside the State of Oklahoma, the source and receipt of news from outside the State of Oklahoma, and the source and receipt of advertisements of nationally advertised goods.

It Is Further Ordered that the service of a copy of this order to show cause, together with a copy of the application of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, be made upon the respondent on or about the 2nd day of February, 1944, and that such service be deemed sufficient service.

Dated this 29th day of January, 1944.

EUGENE RICE,
United States District Judge.

Filed January 29, 1944. John H. Pugh, Clerk, U. S. District Court.

U. S. Marshal's Return.

Received this writ at Muskogee, Okla. on Jan. 29, 1944 and on Jan. 31 1944 in Muskogee, Okla. I served a true and correct copy of Order to Show cause and Petition, on the Oklahoma Press Publishing Co. by serving Franklin E. Katterjohn, General Manager of said Oklahoma Press Publishing Co.

GRANVILLE T. NORRIS, U. S. Marshal.
By: JOHN D. REID, Deputy.

Filed February 2, 1944. John H. Pugh, Clerk, U. S. District Court.

Return to Order to Show Cause and Response to Application to Compel the Production of Documents and Records.

33 The Respondent, Oklahoma Press Publishing Company, a corporation, in response to the Order to Show Cause entered by this Honorable Court on January 29, 1944, upon the application of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, now appears and makes its return to said Order to show Cause

"why an order should not issue requiring the respondent, the Oklahoma Press Publishing Company, a corporation, to appear before L. Metcalfe Walling, Administrator, Wage and Hour Division, United States Department of Labor, or an officer of the Wage and Hour Division, designated by him at such time and place as this Court may order, and to produce the following books, papers and documents:

All books, papers and documents showing the hours worked by, and wages paid to, each of the employees of the said Oklahoma Press Publishing Company engaged in the publication and distribution of the Muskogee Daily Phoenix and the Muskogee Times-Democrat between October 24, 1938, and the date hereof, including all pay roll ledgers, time sheets, time cards and time clock records, and all books, papers and documents *shwoing* the distribution of copies of the said Muskogee Daily Phoenix and the Muskogee Times-Democrat outside the State of Oklahoma, the dissemination of news outside the State of Oklahoma, the source and receipt of news from outside the State of Oklahoma, and the source and receipt of advertisements of nationally advertised goods",

as follows, to-wit:

34 1. This Court is without jurisdiction in the premises.

2. The Administrator is without jurisdiction over Respondent's affairs.

3. The attempted application of the Act to the business of this Respondent violates its rights as guaranteed by the First Amendment to the Constitution of the United States.

4. The attempted application of the provisions of Section 11(a) and (c) of the Act to this Respondent is without authority under the Act, and violates Respondent's rights as guaranteed by the Fourth Amendment to the Constitution of the United States.

5. The attempted application of the provisions of Section 11(a) and (c) of the Act to the Respondent also violates Respondent's rights as guaranteed by the Fifth Amendment to the Constitution of the United States.

6. By reason of the provisions of Section 13 (a) (8) of the Act, the attempted application of any of the provisions of the Act with respect to wages or hours of employees of this Respondent, violates its rights as guaranteed by the Fifth Amendment to the Constitution of the United States.

7. By reason of the provisions of Section 15(a) (1), (2) and (5), and those of Section 16(a) and (b), the order requested by the Administrator, if granted, would violate the rights of this Respondent as guaranteed by the Fifth Amendment of the Constitution of the United States.

8. The Administrator is without authority to apply the provisions of Sections 6 and 7 of the Act to employees of this Respondent engaged in a bona fide executive, administrative, professional or local retailing capacity, or in the capacity of outside salesman, because of the provisions of Section 13(a) (1) of the Act exempting such employees from the provisions of Sections 6 and 7 of the Act.

9. The Administrator is without authority to apply the provisions of Sections 6 and 7 of the Act to this Respondent because of the provisions of Section 13(a) (2) of the Act.

Further responding, and in particular in answer to the application of the Administrator, respondent

1. Admits on information and belief that L. Metcalfe Walling, therein referred to as the Administrator, is the Administrator of the Wage and Hour Division, United States Department of Labor; denies that Section 11(a) of the Act empowers the Administrator or his designated rep-

resentatives to investigate, enter and inspect places and records (and make such transcriptions thereof) of employment, in any industry, as he may deem necessary or proper to determine whether any person has violated any provision of the Act; denies that by virtue of Section 9 of the Act the provisions of Sections 9 and 10 of the Federal Trade Commission Act of September 16, 1914, as amended, U.S.C., Title 15, Sec. 49 and 50 (relating to the attendance of witnesses and the production of books, papers and documents) are made applicable to the jurisdiction, powers and duties of the Administrator in the manner alleged by petitioner; and denies that the Administrator has the power to issue and cause to be served upon any person a subpoena requiring the production of books, documents, records and papers relating to any matter under investigation.

Further answering the allegations in paragraph 1, Respondent respectfully shows that under the precise provisions of Section 11(a) of the Act no general authority is given to the Administrator or his designated representatives to enter for purposes of inspection any establishment, unless that establishment be "in any industry subject to this Act"; that there has been no final determination that the newspaper publishing business as such is an industry subject to the Act; that the newspaper publishing business is not an industry subject to this Act, as is more fully shown in the affidavit of Kenneth E. Olson, Dean of the Medill School of Journalism, Northwestern University, marked Exhibit "A", attached hereto and asked to
36 be read as a part hereof; that this Respondent is not an industry subject to the Act, as is more fully shown in the two affidavits of Paul J. Schaefer, marked Exhibits "C" and "D", attached hereto and asked to be read as a part hereof; that the Administrator has assumed and asserted authority not even purported to be given to him by the Act, to enter and inspect all places of business in the United States, including newspaper publishing plants, without any prior formal determination as to whether the Act applies to such, and in the absence of complaint, and without reference to any charge of violation of law, as is more fully set out in the affidavit of Elisha Hanson, marked Exhibit "B", attached hereto and asked to be read

as a part hereof; that the purported subpoena duces tecum issued herein alleges that an investigation is being made of complaints of violation by respondent of certain sections of the Act, whereas nowhere, either in the application of the Administrator or in the affidavit of Erle P. Bryan attached thereto, is there any allegation that complaints of violation by respondent have been made in fact or upon information and belief.

2. Denies each and every allegation in paragraph 2. Further answering the allegations of said paragraph 2, Respondent respectfully shows (a) that the investigation alleged to have been conducted was not conducted in accordance with the precise provisions of Section 11(a) of the Act; (b) that the Administrator is without jurisdiction over Respondent's business; and (c) that this Court is without jurisdiction.

3. Admits that Respondent is a corporation organized and existing under and by virtue of the laws of the State of Oklahoma, with its principal office and place of business at Muskogee, Oklahoma; denies that it is within the jurisdiction of this Court in or for this proceeding.

37 4. Denies that Franklin E. Katterjohn is the business manager of respondent corporation, but admits that he is the business manager of the two daily newspapers referred to herein.

5. Admits that Respondent is engaged in the business of publishing two daily newspapers, to-wit, the Muskogee Daily Phoenix and the Muskogee Times-Democrat, but denies each and every other allegation in said paragraph 5.

Further answering the allegations of said paragraph 5, Respondent respectfully shows that it is engaged in the business of disseminating important public information in the printed form, said information being in the nature of news, editorial comment, and advertising matter, which when gathered together by Respondent is published by it in its newspapers aforesaid, which are published as follows: the Muskogee Daily Phoenix each morning, and the Muskogee Times-Democrat each evening except Sundays. That the function of a daily newspaper is not to produce goods for

commerce, but to serve its community through the dissemination of information in the printed form, as is more fully described in the affidavit of Kenneth E. Olson, marked Exhibit "A", attached hereto and asked to be read as a part hereof.

That since June 1, 1939, none of Respondent's circulation in either of said newspapers has been sent or distributed outside the State of Oklahoma, except that approximately 120 copies of the Muskogee Daily Phoenix and approximately 17 copies of the Muskogee Times-Democrat during the past two years have been mailed daily to former Muskogee residents and citizens who are serving in the armed forces of the United States, both in this country and abroad, for which papers so mailed no charge is made and no compensation of any character is received, and except that Respondent has mailed daily to its out of state representative copies of the papers for its foreign advertisers, for which papers so mailed no charge is made and no compensation is received. That in rare instances copies of said papers are mailed direct to foreign advertisers upon their request, but no compensation is charged or received for such copies; all of which is more fully described in the two affidavits of Paul J. Schaefer, marked Exhibits "C" and "D", attached hereto as a part hereof and asked to be read as a part hereof.

38 6. Denies each and every allegation of paragraph

6. Further answering the allegations of said paragraph 6, Respondent denies that the provisions of Sections 6, 7, 11(c), and 15(a) (1), (2) and (5) of the Act apply either to its employees or to Respondent itself; denies that Erle P. Bryan had any authority under Section 11(a) of the Act to enter its plant for the purpose of making an inspection.

Still answering the allegations of said paragraph 6, Respondent respectfully shows that on June 3rd and 4th, 1943, one Erle P. Bryan appeared at respondent's office, represented himself to be a duly authorized representative of the Administrator, and sought to make an investigation of Respondent's business; that Respondent, on advice of counsel, refused to permit said purported representative

to inspect its books and records, on the ground that its business is not subject to the provisions of the Act, and that its employees are not subject to the provisions of the Act, and that its employees are not engaged in activities covered by the Act; that Respondent therefore refused to permit said purported representative to examine records pertaining to hours worked by or compensation received by its employees; that Respondent informed said purported representative that it would not produce for inspection records of any kind, for the reasons herein stated and upon advice of counsel.

Further answering the allegations in paragraph 6, Respondent respectfully submits on information and belief that the attempt to inspect its business was made by said Erle P. Bryan in the carrying out of a program laid down by the Administrator and his predecessors for an inspection of all business and industry in the United States, in the absence of any complaint against any particular business or industrial establishment and without reference to any charge of *ciolation* of law, and in the absence of any such charge of violation of law, and without any prior determination as to the applicability of the provisions of the
39 Act to such business and industries, as is more particularly described in the affidavit of Elisha Hanson, marked Exhibit "B", attached hereto and asked to be read as a part hereof.

7. Respondent admits that it refused to allow and permit an inspection of its records, and states that its refusal to permit such inspection was for the reasons herein set forth.

8. Respondent denies that the subpoena duces tecum referred to in paragraph 8 of the Application was issued by the Administrator under the powers conferred upon him by Section 9 of the Act. Respondent admits that on November 3, 1943, a copy of petitioner's Exhibit "C" was delivered to Franklin E. Katterjohn, but in this connection Respondent denies that Franklin E. Katterjohn is now or was at any time the business manager or a stockholder, director or officer of the respondent corporation, nor is he nor has he ever been a managing or general agent, or an agent authorized by appointment or by law to receive service

of process for or on behalf of said respondent corporation. That on said date he was only the business manager of the two newspapers herein mentioned, and never at any time has he had any other connection with said respondent corporation.

Further answering the allegations of said paragraph 8, Respondent objects to the description of the alleged subpoena, and prays reference to the subpoena itself, and denies that the alleged subpoena purported to call for the production of specific books, papers, documents or records. Respondent denies that the said alleged subpoena duces tecum correctly describes Respondent's books, papers, documents and records.

9. Respondent denies that Franklin E. Katterjohn has or ever had control of the books, records and documents described in said subpoena duces tecum, with authority to permit their inspection, and alleges that the said Katterjohn advised the said Erle P. Bryan that he, Katterjohn, had no authority to permit an inspection of the records of said newspapers before receiving the consent of the President of the corporation, which consent he has never received.

10. Respondent is without knowledge as to the whereabouts of Ernest M. Worley as alleged in paragraph 10 of the application, at the time alleged; admits that it did not appear before him at the time and place alleged; denies that there was any legal requirement for it to appear then or at any other time, in compliance with the command of the alleged subpoena duces tecum; denies that the alleged subpoena duces tecum is a valid subpoena duces tecum; denies that it was served upon Respondent in the manner and form required by law, and alleges that said subpoena duces tecum was not delivered to or served upon any officer, director, stockholder, general manager, or managing or general agent of respondent corporation, or an agent authorized by appointment or by law to receive service or process for or on behalf of said respondent corporation. That at all times since March 17, 1941, Franklin E. Katterjohn has been and now is only the business manager of the two newspapers herein mentioned, and he is not and never has been connected with said respondent corporation in any other ca-

pacity. On belief Respondent alleges that said subpoena duces tecum, together with numerous other subpoenas of like nature, was signed L. Metcalfe Walling, in blank, and that the name of the Respondent and all other typewritten matters in said printed subpoena were inserted by other parties unknown to Respondent, after the signing thereof by the said L. Metcalfe Walling.

11. Respondent denies each and every allegation of paragraph 11. Further answering the allegations of said paragraph 11 of the Application, respondent respectfully submits that the Administrator is without authority under the Act to conduct a general "fishing expedition" in-
41 to Respondent's business, to determine whether Respondent has violated Sections 6, 7, 11(c), 15(a) (1), 15(a) (2), and 15(a) (5) of the Act. Respondent further denies the applicability of said provisions of the Act to its business, or to its employees, and respectfully submits that the Administrator is without any jurisdiction whatsoever over its business.

12. Respondent denies that the alleged subpoena duces tecum required this Respondent to produce any books, records, papers, documents or memoranda whatsoever; admits that all of Respondent's books, records, papers, documents and memoranda are in the possession, custody and control of the Respondent.

Finally, Respondent denies the authority of this Court to issue any order requiring the production of books, papers, records or documents whatsoever, in compliance with the alleged subpoena duces tecum herein referred to.

Respondent states that all of its news received from outside the State of Oklahoma and printed in its papers is received over telegraphic wires running into the building of Respondent where said newspapers are printed, and that said wires are connected with automatic teletype machines which receive and automatically record in type similar to that of a typewriter, the news so delivered to it over said telegraphic wires. That no person in the employ of Respondent is required to operate said teletype machines.

Respondent further states that after said out of state news is received as aforesaid, it is sorted out, and only

such portions thereof as Respondent's employees deem proper are edited and published in its newspapers aforesaid, none of which papers are sent to subscribers, distributors or dealers outside the State of Oklahoma.

42 Respondent further states that its out of state advertisements are received through the United States mail from its out of state advertising representative and its out of state advertisers. That a large portion of said out of state advertising is received in the form of mats and electrotype plates. That the cost for all out of state advertisements is paid to Respondent by its said out of state representative, less commissions. As to whether or not said out of state representative collects for all of such advertisements this Respondent has no knowledge or concern.

The affidavit of Paul A. Bruner, marked Exhibit "E", is attached hereto and made a part hereof, and is asked to be read as a part hereof. The affidavit of Franklin E. Katterjohn, marked Exhibit "F". is attached hereto and made a part hereof, and is asked to be read as a part hereof.

Respondent further states that in the publication and distribution of its newspapers aforesaid it is not engaged in interstate commerce, and that its said employees are not engaged in interstate commerce, or in the production of goods for interstate commerce.

Wherefore, Respondent respectfully prays:

(1) That the Order entered herein on January 29, 1944, requiring Respondent to appear before this Honorable Court to Show Cause, etc., hereinbefore referred to, be vacated, and

(2) That this proceeding be dismissed.

JOSEPH C. STONE.
CHAS. A. MOON,
Attorneys for Respondent.

State of Oklahoma, Muskogee County, ss.

43 Tams Bixby, Jr., being first duly sworn, upon oath states that he is the President of the Oklahoma Press Publishing Company, a corporation, Respondent in the above entitled cause, and that he has been the President of said corporation since the 16th day of January, 1941.

Affiant further states that he has read the foregoing Response and knows the contents thereof; that the statements and allegations therein made are true and are known to affiant of his personal knowledge; that the statements and allegations therein made upon information and belief are by this affiant believed to be true; that the statements and allegations therein denied are untrue, and that the statements and allegations therein denied upon information and belief are by this affiant believed to be untrue; that the conclusions of law therein stated are upon information and advice of counsel, and are by this affiant believed to be true.

TAMS BIXBY, JR.

Subscribed and Sworn to before me this 4th day of March, 1944. La Mona Blair, Notary Public. My commission expires: April 5, 1947. (Seal).

Exhibit A.

Affidavit of Kenneth E. Olson.

State of Illinois, County of Cook, ss.

44 Kenneth E. Olson, being duly sworn, deposes and says:

I reside at 789 Vernon Avenue, Glencoe, Illinois. I am, and have been since 1937, Dean of the Medill School of Journalism Northwestern University, Evanston, Illinois. I am a graduate of Northland College, A.B., and of the School of Journalism, University of Wisconsin, A.M. and M.A. in journalism. After my service in France with the American Expeditionary Forces I was a student for some time at the University of Bordeaux.

I have had many years experience in the field of journalism. While attending high school at Prentice, Wisconsin, I worked as a handy man on a weekly newspaper, setting type, operating a linotype machine, and doing some reporting.

Prior to the World War I worked as a reporter and later as City Editor for the Ashland (Wis.) Press and then as a reporter on the Duluth Tribune and the Milwaukee Senti-

nel. On my return from overseas I joined the staff of the Milwaukee Journal where I was successively copy reader, night editor, telegraph editor, make-up editor, assistant Sunday editor and promotion editor. In 1923 I became managing editor of the Capital Times, Madison, Wisconsin.

45 From 1924 to 1930, I was engaged in the advertising field first as new business and advertising manager of the Commercial National Bank and Union Trust Company at Madison and later for four years as the head of my own advertising agency, which handled the accounts for some forty banks, trust companies, investment houses and insurance firms.

From 1932 to 1935, I was associated with the Northwest Daily Press Association handling market research and analyses and national advertising promotion. During this period I was an editorial contributor to the Minneapolis Star.

From 1935 to 1937, I was manager of the New Jersey Press Association. I began part time lecturing at the University of Wisconsin, School of Journalism, while in Madison and was an Assistant Professor there from 1926 to 1930.

I was a Professor of Journalism at the University of Minnesota from 1930 to 1935.

As manager of the New Jersey Press Association, I was also Director of the Department of Journalism at Rutgers University.

I am familiar with the business of publishing newspapers in the United States, with the interests and problems of newspapers, whether published on a one, two, three, five, six or seven day a week basis. Newspapers are published on all those bases and any newspaper with five or more issues a week is known as a daily newspaper. Daily newspapers in turn are known as either morning or evening newspapers. Some newspapers have both morning and evening issues. A number of newspapers are published on Sunday only. Custom has designated them as Sunday
46 newspapers, whereas newspapers published on one week day only are known as weekly newspapers.

Semi-weekly and tri-weekly newspapers are just what their names indicate, i.e., publications issued twice or three times a week as the case may be.

Whatever a newspaper may be, weekly, semi-weekly, tri-weekly, daily, daily and Sunday or Sunday only, its business is exactly the same as that of all other newspapers. That business is the gathering and dissemination of information in the printed form. The information in turn is divided into three classes: news, editor comment and advertising.

The newspaper publishing business is essentially a local business. More than 90 per cent of the total circulation of all daily newspapers and more than 85 per cent of the total circulation of all Sunday papers is distributed within the state of publication. Weekly, semi-weekly and tri-weekly newspapers have an even greater proportion of wholly intrastate circulation.

Throughout its entire history the business of the press has been one of service. It serves its readers by bringing to them that information in the form of news that the editor regards as sufficiently important to justify its publication; information in the nature of comment on matters of importance; and information concerning the goods, services or ideas of others who pay for the service of its dissemination in the form of newspaper advertising.

Newspaper advertising falls chiefly into four classes known in the business as local display, general or national display, classified and legal. Classified and legal advertising are almost wholly local in character and local advertising accounts for more than 85 per cent of the total volume of newspaper advertising.

447 Newspapers have but two sources of revenue from the service they render. One is circulation revenue, derived from the sale of their publication, and the other is advertising revenue, derived from the charge made to advertisers for printing, publishing and disseminating information concerning their business or interests.

For more than 100 years it has been the almost universal custom of daily and Sunday newspapers to sell their publi-

cations for less than the cost of publication. They must depend upon revenues from the service they render their advertisers to meet the greater portion of the costs of their news and editorial service to their readers. No newspaper in modern times has continued publication for any appreciable period of time on circulation revenue alone.

This practice of selling newspapers at less than their cost of publication has made possible the distribution of newspapers to all elements of our population. It has made possible an informed electorate which our founding fathers envisioned when they entrusted newspapers with the task of keeping citizens informed of the news of their government. Were subscribers to pay for their newspapers on the basis of cost of publication newspaper subscriptions would be very limited. The quantity and quality of public information would be correspondingly limited.

Newspapers employ staffs of highly skilled professional persons to gather, write and edit their news; to solicit, prepare, and lay out advertising copy; and to comment upon matters of general public importance.

According to the Census of Manufactures for 1937 they had the largest number of high salaried employees and the highest paid wage earners of any group engaged in business or industry in the United States.

Instruction in journalism is offered in 545 four-year colleges and universities. With the addition of junior colleges the number is over 700. There are thirty-three professional schools of journalism, whose prerequisite requirements are comparable to those of law schools and schools of medicine. These schools are recognized throughout the educational and business fields as professional schools.

48 As of the beginning of this year there were more than 13,000 newspapers published in the United States, of which approximately 1,800 were daily or daily and Sunday newspapers and the remainder weekly, semi-weekly, or tri-weekly newspapers. These newspapers employ thousands of persons in executive, administrative and professional capacities and as outside salesmen.

Daily newspapers vary greatly in circulation, ranging from less than 1,000 copies daily to more than 1,500,000

copies. Of the 2,044 daily newspapers published in the United States as of December 31, 1939, 437 had circulations under 3,000 copies daily; 466 between 3,000 and 5,000 daily; 473 between 5,000 and 10,000 daily; 350 between 10,000 and 25,000 daily; and 156 between 25,000 and 50,000 daily; and 78 between 50,000 and 100,000 daily. Only 84 out of 2,044 daily newspapers had circulations in excess of 100,000 daily, and of these only 19 had circulations in excess of 250,000 daily.

Newspapers are essentially and predominantly local in the nature of their service. With few exceptions, all of them have by far the greatest portion of their total aggregate circulation distributed within the trading area of the villages, towns or cities in which they are published. Very few newspapers have any appreciable amount of circulation beyond 100 miles from the place of publication. Thousands of newspapers circulate in far smaller radii, except in respect of a few mail subscriptions which go mainly to former residents of the localities in which they are published. More than 90 per cent of the daily newspapers published in the United States distribute in excess of 98 per cent of their circulation entirely within the state of publication.

Daily, weekly, semi-weekly and tri-weekly newspapers are competitive with one another in those areas where any two or more of them are published. They are competitive in every form of their service. Each tries best to serve its readers with news and editorial comment on subjects
49 of interest to them. Each tries best to serve advertisers, not only in the publication of their advertising but in the manner of counselling as to preparation of copy and pictures used therein and in the correlation of merchandising plans with the advertising appeal.

While every newspaper has regular schedules for the publication of each of its various editions, no newspaper, if properly it is to serve its readers, can adhere strictly to these in times of flood, disaster, war, political campaigns or other conditions of great news importance. The people want news when it is news, not at some other time, and if a newspaper is to serve them it must be prepared to meet their demands.

Likewise in the purely intellectual field of gathering, writing and editing the news it is impossible for a newspaper to adhere to rigid time schedules. It cannot, for instance, ask a City Council or a state legislature or Congress to hold a session and dispose of matters to meet its convenience. It can neither schedule committee meetings of such legislative bodies nor regulate the time consumed therein. The breaks of the news are beyond a newspaper's control, yet it must at all times be prepared to meet such breaks. The work of those engaged in gathering, writing or editing news, in soliciting, or preparing copy for advertising cannot be standardized in relation to a given period of time. A reporter may spend several days on a single story or he may do several stories in a single day. A copy reader may spend an hour or more on a single involved story and in the next hour handle a dozen shorter stories. A telegraph editor may spend hours putting together the dispatches from the war zone, making changes in leads as new news comes in between editions. A reporter assigned to a political cleanup may spend days or weeks gathering his information before he writes a single line. A hurricane strikes New England and the New England newspapers must rush men into the field to gather the news in the wake of its destruction. An airplane is wrecked or a train goes through a bridge or fails to round a curve and the newspapers must get the news and the pictures which are a part of the news for their readers. Over the time of such incidents a newspaper has no control. Its operations must be flexible enough for it to handle them.

Any act which imposes a penalty upon a newspaper in its efforts to serve its readers, such as a right requirement as to maximum hour week, in my opinion, would serve seriously to restrict the service of the press in the carrying on of its business of gathering and disseminating information.

The definitions of professional, executive and administrative employees and outside salesmen promulgated by the Administrator, known as Regulations Part 541—Sections 541.1 to 541.6—if applied to the newspaper publishing business, will cause irreparable injury to more than 1,000 daily newspapers in this country.

By reason of the very nature of these definitions execu-

tives on hundreds of small newspapers who now solicit and prepare advertising, direct circulation, write editorials and perform other services will either be barred from performing those services or entitled to receive time and one-half overtime in excess of 40 hours in any one week. Nearly all of these small daily newspapers operate on a six day basis in villages, towns and cities where there is a limited supply of journeymen mechanics and limited revenue for newspaper publication. Any increased burden on these newspapers will have to be met either through added revenues or by curtailment of service, and, in my opinion, from my knowledge of the field, they will have to be met through curtailment of service which curtailment will undoubtedly force many of them to reduce their publishing operations from a six day a week to a five day a week basis and others to suspend publication altogether.

51 It has been a long established custom on these small newspapers that the foremen in their mechanical departments work at the same tasks as the journeymen working under their direction as many hours in any one week as a journeyman works at straight time rates and perform their executive duties in addition. Under the new definitions a working foreman is limited to eight hours of work similar to that performed by a journeyman working under his direction. If he exceeds eight hours in any one day then under the terms of the Administrator's order he is no longer an executive and his employer is obligated to pay him overtime.

These regulations also fix a minimum of $200 a month for both administrators and professional employees of newspapers. Failing the establishment of such a minimum, all persons employed in a professional capacity, whether their salaries be lower or higher than $200 per month, must be paid overtime for work in excess of forty hours in any one week. There is no difference in the professional nature of the work performed by an editor, a managing editor, a city editor, a news editor, a sports editor, a society editor, a copy reader, a rewrite man, a reporter, an advertising solicitor, an advertising writer, or an advertising layout man who draws more than $200 per month, and that performed by one who draws less than $200 per month.

More than 1,300 daily newspapers in the United States have circulations of less than 10,000 copies per day and more than 400 newspapers have circulations of less than 3,000 copies per day. The requirements in these definitions of persons intended by Congress to be exempt from the minimum wage and maximum hour provisions of the Act place an impossible burden on hundreds of daily
52 newspapers. To meet that burden they will either have to curtail their service to their readers or obtain additional revenues elsewhere, failing which many of them will be forced out of business. In my opinion, hundreds of newspapers will be unable to find additional revenues adequate to meet this increased cost. They will either have to curtail their service or suspend publication altogether.

This affidavit is made for use in the above entitled case.

K. E. Olson.

Subscribed and Sworn to before me this 2nd day of February, 1944. Rita Lambert, Notary Public. My commission expires: March 13, 1945. (Seal).

Exhibit B.

Affidavit of Elisha Hanson.

City of Washington, District of Columbia, ss.

53 Elisha Hanson, being duly sworn, upon his oath states and deposes that he is an attorney at law with offices at 729 Fifteenth Street, Northwest, Washington, D. C. That he is admitted to practice in the courts of the District of Columbia, the State of Maryland, and before the Supreme Court of the United States. That he is now and for some years past has been general counsel of the American Newspaper Publishers Association which embraces within its membership the publishers of more than 425 daily and/or Sunday newspapers. That, as a part of his duties as general counsel for said Association, he has had to advise members of said Association as to their rights, obligations and duties under various statutes enacted by the Congress of the United States as well as by state legis-

latures as those statutes affect or interfere with or restrict the business of the press; that in the light of said duties affiant, since the date of the enactment of the Fair Labor Standards Act, has attempted in every proper manner to inform himself as to the policies of administration of that Act insofar as such policies may affect publishers of daily and/or Sunday newspapers in the United States.

54 Affiant further deposes and says upon information and belief, that there has been no formal determination by any of the persons who have served as Administrators of the Wage and Hour Division since the enactment of the Act as to the applicability of the provision of Section 11 (a) of said Act to the daily newspaper publishing business as an "industry subject to this Act". And, upon information and belief, that instead of making such a formal determination prior to conducting investigations into various businesses and industries in the United States, the present Administrator of the Act is engaged upon an investigation of all forms of business and industry in the United States in an effort to determine whether the hours worked by their employees exceed the hours designated in Section 7 of the Act, whether the wages paid to their employees exceed the minimum wages designated in Section 6 of the Act, and whether said business and industries are paying overtime to their employees or have paid overtime to their employees in accordance with the formula laid down in Section 7 of the Act, since the effective date of the Act, and all of this without any prior formal determination as to whether the Act applies to such business or industry or any particular establishment thereof prior to said investigation.

Affiant further deposes and says that Administrators of the Fair Labor Standards Act, in various public statements and official news releases have asserted the power to make nation-wide inspections of all businesses and industries to be followed up by routine inspections of all businesses and industries, in the absence of complaint and without reference to any charge of violation of law and in the absence of any such charge of violation of law.

Affiant further deposes and says, upon information and

belief, that on January 23, 1940, Philip B. Fleming, then Administrator of the Wage and Hour Act, addressed
55 the Southern States Industrial Council at Atlanta, Georgia, and in the course of his address said:

"We shall not wait until a complaint has been made against a plant before we look into it, but will visit it as a matter of routine at periodic intervals. That will assure employers of general compliance, and eliminate the possibility of competitive inequities that result when a few find it possible to ignore a law with which their business rivals are forced to comply":

that said remarks are contained in a news release issued by the Wage and Hour Division, United States Department of Labor under date of January 23, 1940, identified as R-600.

Affiant further deposes and says, upon information and belief, that on April 1, 1940, the Wage and Hour Division, United States Department of Labor, issued press release R-700, wherein Philip B. Fleming, then Administrator of the Act, was quoted as saying:

"We have inspected an establishment only on a complaint, as we have many complaints awaiting attention. From now on, we are not going to await complaints in order to protect establishments in compliance; that is, paying no one less than 30 cents an hour and paying at least time and a half the worker's regular rate for overtime.

"All regional directors have been instructed to this effect. This is another step toward routine inspection of all establishments governed by this Act."

Affiant further deposes and says, upon information and belief, that on or about March 1, 1940, said Philip B. Fleming made another statement of similar import, as follows:

"I believe that the only kind of enforcement which will not result in severe competitive disadvantage to those employers who are complying is regular routine enforcement by regular routine inspection of all the establishments whose employees are determined to be covered.

"Where such enforcement and inspection reveals viola-

tions of the Act on the part of employers which are not wilful and malicious, it is my intention to give such employers an opportunity to comply and to make amends to the employees in respect to whose wages and hours the violation was ascertained, etc."

56 and that said statement was reported in the Wage and Hour Reporter under date of March 11, 1940.

Affiant further deposes and says that in the said Wage and Hour Reporter of June 17, 1940, said Administrator Fleming, in discussing his inspection of lumber mills, stated that the drive was not primarily a punitive campaign, but that it was his policy to work an entire industry over to see if there have been any violations of the law in that industry.

Affiant further deposes and says, upon information and belief, that in certain daily newspapers of May 21, 1940, there appeared quotations from a speech made by the said Administrator, Philip B. Fleming, before the Controllers Institute of America, wherein he said:

"If we have any reason to suspect that one hoop-skirt factory is violating the law, we not only check up on it, but we immediately move into every other hoop-skirt factory. By that method we are able to make good our promise to the employer that if he complies, his competitors also will be made to comply."

Affiant further deposes and says, upon information and belief, that on August 24, 1940, the then Administrator, said Philip B. Fleming, ordered a nation-wide drive for compliance with the Wage and Hour Law in five manufacturing industries—furniture, leather goods and luggage, boots and shoes, hosiery and woolen goods; that information concerning such order was contained in an Associated Press Dispatch dated, Washington, August 24. That said Associated Press, inter alia, quoted said Administrator, Philip B. Fleming, as stating that in his opinion a majority of the factories to be inspected "as in most of the other industries of the country", were complying with the law and further that the objective of the drive was to bring the minority "into line".

Affiant further deposes and says, upon information and belief, that on August 25, 1940, the Nashville Tennesseean, a daily and Sunday newspaper published at *Nasville,*
57 Tennessee, quoted William M. Eaves, Regional Director of the Wage and Hour Division, as announcing a drive to check and enforce compliance with the Wage and Hour Law in five industries in Tennessee and Kentucky to begin on August 26 and that said article in said Nashville Tennessean further credited said Regional Director with stating that inspectors making the original drive on these five industries would demand proper record keeping "in order that the way will be paved for quick routine inspections in the future".

Affiant further deposes and says upon information and belief that on September 5, 1940, Frank J. G. Dorsey, Regional Director of the Wage and Hour Administration whose offices are 1216 Widener Building, Philadelphia, Pennsylvania, sent a news release to the daily newspapers published in Easton, Pennsylvania, for use in their editions of September 6, 1940, wherein said Dorsey said:

"Establishments of five important industries in Easton, Northampton County, and in nearby parts of the state will be inspected at once for compliance with the Federal Wage-Hour Law, Regional Director Frank J. G. Dorsey announced at his office in Philadelphia. The inspections are part of a nation-wide drive by which all establishments covered by the law will be inspected, industry by industry.

"A group of eight inspectors arrived here today to take over the work in this district. The industries that will be inspected here as part of concentrated simultaneous inspection throughout the country are: Furniture, Leather Goods and Luggage, Boots and Shoes, Hosiery and Woolen Goods.

"This is a step in a drive to obtain compliance with the Fair Labor Standards Act on a national industry-wide basis, Mr. Dorsey stated. It follows a compliance drive in the lumber industry, now approaching a successful conclusion.

"The object of the drive, Mr. Dorsey explained, is to benefit both employers and employees throughout a given

industry, by protecting an establishment that is in compliance from the lower-cost competition of one which is not observing the wage and hour requirements, and by gaining for workers the wages and overtime to which they are entitled under the Act.

* * * * *

58 "A majority of the factories in these and in the other industries in the country are complying with the Fair Labor Standards Act or have shown a willingness to do so as soon as inadvertent violations are pointed out, Mr. Dorsey stated. The drives are not punitive, nor does the inspection of a given industry mean that it is more of a violator than others. The inspectors on this job will emphasize its educational aspects. They will first locate violations and then by explaining to the non-complying employer the requirements and purposes of the Act and its benefits to both employers and employees, attempt to bring him into voluntary compliance. Legal action will be taken only if necessary."

Affiant further deposes and says that these routine inspections are in violation of law and in defiance of Congressional policy; that Congress has twice expressed emphatic disapproval of the inspection policy of the Wage and Hour Division.

The 77th Congress during its first session reduced the budget of the Wage and Hour Division for the fiscal year 1942 by eliminating an item of $350,000 requested for inspection purposes. In its report to the House, the House Appropriations Committee said:

"As a matter of policy, the committee is unable to find any justification for placing the inspection on a basis of inspecting each and every plant that might be covered by the act. There are many enforcement statutes of all kinds being administered by various agencies of the Government. If the Government were to adopt a policy of inspecting every unit of production or every individual that might be covered by these acts, the cost would be staggering and all out of proportion to the benefits to be obtained thereby."

The Senate reinstated the item in the bill. The measure

then went to conference. The House unanimously instructed its conferees to insist upon the elimination of the item. This they did and the Senate yielded. In asking for instructions, Representative Tarver, Chairman of the House Sub-Committee, said:

"We have moved here that the House insist upon its disagreement to the Senate amendments. We repeat the statement which was made in the presentation of the bill originally that if the House feels that this wholesale investigation of the plant of every employer in the United States should be made, then you ought to vote down the motion which is now being offered."

59 Notwithstanding the express condemnation of his routine investigations by Congress, affiant deposes and says, upon information and belief, that Administrator Fleming announced that he intended to continue them in an address before the Mississippi State Federation of Labor at Meridian on July 14, 1941.

Affiant further deposes and says that the Wage and Hour Division continued its routine investigations despite the disapproval of Congress, as is demonstrated by the report of the House Appropriations Committee in reducing by the sum of $250,700 the budget of the Wage and Hour Division for the fiscal year 1943 The report condemns the Division for its failure to follow the wishes of the Committee and Congress in the matter of routine inspections.

Nevertheless, the present Administrator, who defended the Division's methods of investigation before the House Appropriations Committee, has not, to affiant's knowledge, adopted any policy of investigation other than that followed by his predecessors as hereinbefore described, and continues to assert the power to enter and inspect any individual establishment without reference to any charge of violation of law.

Affiant further deposes and says that there are at the moment more than seventy agencies in Washington which in one form or another exert a regulatory control over the daily affairs of life or compete with those engaged in business; that the demands which the regulatory agencies make upon business are beyond comprehension; that in 1938, for

instance, it was estimated that business concerns in this country were called upon to make more than 135,000,000 reports on more than 4,700 report forms; that the burden has since incresed many fold; that only a few weeks ago the head of the War Production Board became so concerned over the waste of time in war plants required for the filling
60 out of these forms that he ordered a study to be made to bring about their simplification; that it has been estimated that in the machine tool industry alone more than 25,000 man hours per week are now required to answer the questionnaires of the Government concerning the activities in that industry; that it is estimated that at the present time there are 35 different Government wartime questionnaires sent to this one industry alone; and that 18 different monthly reports are required of it, four quarterly reports, and one annual report and in addition a report must be made out on every order received as well as a report to accompany every purchase order for materials.

Affiant further deposes and says that the Wage and Hour Division sends report forms to employers with the demand that they be filled out, among them Form AD-85, in which employers are asked to inform the Division whether violations of law have occurred and to agree to make restitution to employees under the Division's supervision; in addition, on information and belief, that officials of the Wage and Hour Division visit employees at their homes to gather information on their hours of labor and rates of pay and solicit complaints of violation of law through confidential questionnaires sent to employees, copies of which will not be made available for perusal by employers.

Affiant further deposes and says that numerous newspaper publishers, including respondent in the above entitled case, have consulted him in respect of the legality of the Administrators' demands for inspection of their books, papers, records, etc., as a part of their general campaign of inspection of all businesses and industries in the United States, in the absence of complaint or charge of violation of the law, in an effort to compel universal compliance with the terms of the Fair Labor Standards Act; that affiant has
61 advised said publishers that in his opinion no such Administrator had or has authority, expressed or im-

plied, to carry on a fishing expedition into the books, papers and records of any newspaper publisher in the hope of turning up a violation of this Act or any other law. Said advice was based in part on affiant's belief that an attempt to apply the Fair Labor Standards Act to daily newspaper publishers genrally would violate their rights as guaranteed by the First and Fifth Amendments to the Constitution of the United States; that the daily newspaper publishing business is not such a business as can be regulated by Congress; and further that the assertion of the power to make general inquiry into the conduct of said business for the purpose of determining whether or not it is complying with the Fair Labor Standards Act violates the rights of publishers as guaranteed by the Fourth Amendment to the Constitution of the United States; that a similar general inquiry when attempted by another agency of the Federal Government in respect of another type of business met with a proper condemnation by the Supreme Court of the United States in the notable decision of Federal Trade Commission v. American Tobacco Co., 264 U. S. 298.

Affiant further deposes and says that where complaints are filed with the Administrator, those complained against are kept in ignorance as to the nature of the complaint, as well as the identity of the complainant; that based upon this policy of secrecy, the Administrator has issued an invitation to "competitors and public spirited citizens as well as employees" to complain against those engaged in business and industry, and has stated in respect of such complaints that "All information, including the identity of the complainant, will be held confidential", which invitation and which statement can be found at Page 118 of the Wage and Hour Manual, 1941 Edition, published by the Bureau of National Affairs, Inc., Washington, D. C.

62 This affidavit is made for use in the above entitled case.

ELISHA HANSON.

Subscribed and Sworn To before me, a Notary Public, this 2nd day of February, 1944. Lelitia Armstead, Notary Public, D. C. (Seal)

Exhibit C.

Affidavit of Paul J. Schaefer.

State of Oklahoma, County of Muskogee, ss

63 Paul J. Schaefer, being duly sworn, deposes and says:

I am a resident of the County of Muskogee and State of Oklahoma. For a period of 17 years last past I have been continuously and am now, Circulation Manager of the Muskogee Daily Phoenix and the Muskogee Times-Democrat, the two newspapers published at Muskogee, Oklahoma, by the Oklahoma Press Publishing Company, a corporation organized under the laws of the State of Oklahoma.

During said period I have been and am now thoroughly familiar with the circulation department of said newspapers and the operation of this department, and with the circulation and distribution of said newspapers. For the twelve months ending September 30, 1942, as audited by the Audit Bureau of Circulations, the entire total net paid circulation of the Muskogee Daily Phoenix was 11,447 copies, and the entire total net paid circulation of the Muskogee Times-Democrat was 8,991 copies.

64 During this same said twelve months period a daily average total of 7,847 copies of the Muskogee Daily Phoenix, and 6,127 copies of the Muskogee Times-Democrat were distributed entirely within the County of Muskogee in the State of Oklahoma, in the cities, towns and villages all within the County of Muskogee, as follows:

Towns	Muskogee Daily Phoenix	Muskogee Times-Democrat
Boynton	137	82
Braggs	72	65
Camp Gruber	178	284
Council Hill	69	28
Ft. Gibson	106	20
Haskell	256	124
Keefeton	7	24
Muskogee, City	6,266	5,026
Muskogee, R.F.D.	337	39
Oktaha	89	66
Porum	94	108
Taft	22	44
Wainwright	23	1
Warner	54	78
Webbers Falls	123	92
Balance in County (no Township)	14	46
Total	7,847	6,127

The breakdown of figures listed above is for the publication date of September 22, 1942, which was the date selected by the Audit Bureu of Circulations as being a typical average day and there would be but a slight variation of this figure over a year period.

That since June 1, 1939, none of Respondent's circulation in either of said newspapers has been sent or distributed outside the State of Oklahoma, except that approximately 120 copies of the Muskogee Daily Phoenix and approximately 17 copies of the Muskogee Times-Democrat during the past two yers have been mailed daily to former Muskogee residents and citizens who are serving in the armed forces of the United States, both in this country and abroad, for which papers so mailed no charge is made and no compensation of any character is received, and except that Respondent has mailed daily to its out of state representative copies of the papers for its foreign advertisers, for which papers so mailed no charge is made and no compensation is

received. That in rare instances copies of said papers
65 are mailed direct to foreign advertisers upon their request, but no compensation is charged or received for such copies.

The following is a list of several weekly newspapers published in the immediate distribution area of the Muskogee Daily Phoenix and the Muskogee Times-Democrat, which are competitive with our two newspapers, together with, upon information and belief, the circulation of said weekly newspapers, which I have been able to ascertain. No circulation figures are published by the said newspapers and I have been able to procure only the circulation of those newspapers opposite whose names the figures appear:

Name of Paper	Circulation
Boynton Index	522
Eufaula Indian Journal	1,131
Ft. Gibson Independent	650
Haskell News	1,000
Henryetta Free-Lance	2,963
Sallisaw County Times	1,626
Stigler News-Sentinel	1,395
Stilwell Democrat-Journal	1,900
Tahlequah Citizen	990
Wagoner-Record-Democrat	1,640

Besides the foregoing circulation figures, according to the Audit Bureau of Circulations statement for twelve months ending December 31, 1942, the Tulsa World has a paid circulation of a total of 817 copies per day, and the Tulsa Tribune has a paid circulation of 458 copies per day in the City of Muskogee.

Likewise, for the twelve months ending September 30, 1942, The Daily Oklahoman, published in Oklahoma City, has a paid circulation of 210 copies per day, and the Oklahoma City Times, published in Oklahoma City, has a paid circulation of 126 copies per day in the City of Muskogee.

There are other newspapers published in the Muskogee area on which I do not have the circulation figures. However, to my knowledge and belief, in several instances the circulations are substantial.

66 The facts herein set forth are within my own personal knowledge. As to the statements herein made upon information and belief, I believe them to be true.

This affidavit is made for use in the above entitled case.

PAUL J. SCHAEFER,
Circulation Mngr.

Subscribed and Sworn To before me this 3rd day of March, 1944. Freda Ungar, Notary Public. My commission expires: Dec. 13, 1947. (Seal)

Exhibit D.

Affidavit of Paul J. Schaefer.

State of Oklahoma, County of Muskogee, ss.

67 Paul J. Schaefer, being duly sworn, deposes and says:

I am a resident of the County of Muskogee and State of Oklahoma. For a period of 17 years last past I have been continuously and am now, Circulation Manager of the Muskogee Daily Phoenix and the Muskogee Times-Democrat, the two newspapers published at Muskogee, Oklahoma, by the Oklahoma Press Publishing Company, a corporation organized under the laws of the State of Oklahoma.

During said period I have been and am now thoroughly familiar with the circulation department of said newspapers and the operation of this department, and with the circulation and distribution of said newspapers. For the twelve months ending September 30, 1943, as audited by the Audit Bureau of Circulations, the entire total net paid circulation of the Muskogee Daily Phoenix was 12,172 copies, and the entire total net paid circulation of the Muskogee Times-Democrat was 9,491 copies.

Since June 1, 1939, no newspapers have been sold by either the Muskogee Daily Phoenix or the Muskogee Times-Democrat to persons living without the State of Oklahoma. Hence no copies of the aforesaid circulations were sold outside the State of Oklahoma during the said twelve
68 months period.

During this same said twelve months period a daily average total of 9,120 copies of the Muskogee Daily Phoenix, and 6,748 copies of the Muskogee Times-Democrat were distributed entirely within the County of Muskogee in the State of Oklahoma, in the cities, towns and villages all within the County of Muskogee, as follows:

Towns	Muskogee Daily Phoenix	Muskogee Times-Democrat
Boynton	128	73
Braggs	53	66
Camp Gruber	746	999
Council Hill	79	29
Ft. Gibson	118	25
Haskell	217	142
Keefeton	9	30
Muskogee, City	6,976	4,932
Muskogee, R.F.D.	346	41
Oktaha	81	68
Porum	108	116
Taft	24	27
Wainwright	24	1
Warner	62	80
Webbers Falls	136	78
Balance in County (no Township	13	41
Total	9,120	6,748

The breakdown of figures listed above is for the publication date of September 30, 1943, which was the date selected by the Audit Bureau of Circulations as being a typical average day and there would be but a slight variation of this figure over a year period.

That since June 1, 1939, none of Respondent's circulation in either of said newspapers has been sent or distributed outside the State of Oklahoma, except that approximately 120 copies of the Muskogee Daily Phoenix and approximately 17 copies of the Muskogee Times-Democrat during the past two years have been mailed daily to former Muskogee residents and citizens who are serving in the armed forces of the United States, both in this country and abroad, for

which papers so mailed no charge is made and no compensation of any character is received, and except that Respondent has mailed daily to its out of state representative
69 copies of the papers for its foreign advertisers, for which papers so mailed no charge is made and no compensation is received. That in rare instances copies of said papers are mailed direct to foreign advertisers upon their request, but no compensation is charged or received for such copies.

The following is a list of several weekly newspapers published in the immediate distribution area of the Muskogee Daily Phoenix and the Muskogee Times-Democrat, which are competitive with our two newspapers, together with, upon information and belief, the circulation of said weekly newspapers which I have been able to ascertain. No circulation figures are published by the said newspapers and I have been able to procure only the circulation of those newspapers opposite whose names the figures appear:

Name of Paper	Circulation
Boynton Index	522
Eufaula Indian Journal	1,131
Ft. Gibson Independent	650
Haskell News	1,000
Henryetta Free-Lance	2,963
Sallisaw County Times	1,626
Stigler News-Sentinel	1,395
Stilwell Democrat-Journal	1,900
Tahlequah Citizen	990
Wagoner-Record-Democrat	1,640

Besides the foregoing circulation figures, according to the Audit Bureau of Circulations statement for twelve months ending December 31, 1942, the Tulsa World has a paid circulation of a total of 817 copies per day, and the Tulsa Tribune has a paid circulation of 458 copies per day, in the City of Muskogee.

Likewise, for the twelve months ending September 30, 1942, The Daily Oklahoman published in Oklahoma City, has a paid circulation of 210 copies per day, and the Oklahoma City Times, published in Oklahoma City, has a paid circulation of 126 copies per day in the City of Muskogee.

70 There are other newspapers published in the Muskogee area on which I do not have the circulation figures, but to my knowledge and belief, in several instances the circulations are substantial.

The facts herein set forth are within my own personal knowledge. As to the statements herein made upon information and belief, I believe them to be true.

This affidavit is made for use in the above entitled case.

PAUL J. SCHAEFER,
Circulation Mngr.

Subscribed and Sworn To before me this 3rd day of March, 1944. Freda Ungar, Notary Public. My commission expires: Dec. 13, 1947. (Seal)

Exhibit E.

Affidavit of Paul A. Bruner.

State of Oklahoma, Muskogee County, ss.

71 Paul A. Bruner, being first duly sworn, upon oath states that he is the Managing Editor of The Muskogee Daily Phoenix and The Muskogee Times-Democrat, owned by the Oklahoma Press Publishing Company, a corporation, and published at Muskogee, Oklahoma, and that he has been such Managing Editor of said newspapers at all times since July 5, 1930.

That as such Managing Editor affiant has supervision of the reporters on each of said papers, and has general supervision of the preparation of the news published in each of said papers, and is familiar with the manner of procuring, producing and preparing for publication the news articles published in said papers, including both local and foreign news.

That the news received from outside the State of Oklahoma and published in said newspapers is and has been received over telegraphic wires running into the building of the Oklahoma Press Publishing Company at Muskogee, Oklahoma, where said papers are printed and published. That said wires are connected with automatic teletype ma-

chines which receive and automatically record in type similar to that of a typewriter the news so received by said papers. That no person in the employ of the Oklahoma Press Publishing Company is required to operate said teletype machines in the receipt of said news from outside the State of Oklahoma. That mechanics are employed to maintain said machines in working condition.

72 That each of said newspapers employs a telegraph editor, and sometimes an assistant telegraph editor; that they periodically tear off from said automatic teletype machines the printed matter received thereon, which is examined by the editors and/or this affiant. That said editors or this affiant select therefrom such portions thereof as are desired to be and are published in said newspapers. That said foreign news so received over said teletype machines is edited by the said editors or this affiant, and headings are written for such portions thereof as are published in said papers. That in editing said articles for publication in said newspapers portions thereof are frequently stricken and sentences and paragraphs deleted, and in some rare instances sentences and paragraphs are rewritten, but the sense and substance thereof is never changed. That half or more of such foreign news which comes over said teletype machines is rejected and not used in any form by either of said papers.

Affiant states that the facts herein set forth are within his own personal knowledge.

This affidavit is made for use in the above entitled case.

PAUL A. BRUNER.

Subscribed and Sworn to before me this 2nd day of March, 1944. Freda Ungar, Notary Public. My commission expires: Dec. 13, 1947. (Seal).

Exhibit F.

Affidavit of Franklin E. Katterjohn.

State of Oklahoma, Muskogee County, ss.

73 Franklin E. Katterjohn, being first duly sworn, upon oath states that he is the Business Manager of

The Muskogee Daily Phoenix and The Muskogee Times-Democrat, newspapers printed and published by the Oklahoma Press Publishing Company, a corporation, at Muskogee, Oklahoma, and that he has been such Business Manager at all times since the 17th day of March, 1941.

That the out of state advertisements printed in said newspapers since said date have been and are received through the United States mails from their out of state advertising representative and from their foreign advertisers. That the major portion of such out of state advertising is received in the form of mats and electrotype plates.

That the cost for said out of state advertising is paid to the newspapers by said out of state advertising representative, less commission, and said foreign representative in turn collects from the individual foreign advertisers. As to whether or not said foreign representative collects in full from all of said foreign advertisers this affiant has no knowledge, and said newspapers have no concern.

74 Affiant states that the facts herein set forth are within his own personal knowledge. Upon information and belief affiant states that said foreign advertisements have been handled in the manner herein set forth at all times since the 1st day of June, 1938.

This affidavit is made for use in the above entitled case.

FRANKLIN E. KATTERJOHN.

Subscribed and Sworn to before me this 2nd day of March, 1944. Freda Ungar, Notary Public. My commission expires: Dec. 13, 1947. (Seal).

Filed March 7, 1944. John H. Pugh, Clerk, U. S. District Court. By W P W Deputy Clerk.

Order.

75 On this 9th day of March, 1944, this cause comes on for hearing in its regular order, the applicant, L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, appearing by his attorneys Earl Street and Harry Campbell, Jr., and the

respondent, Oklahoma Press Publishing Company, a corporation, appearing by its attorney, Chas. A. Moon.

The respondent thereupon asks leave to file an amendment to its Response, which amendment consists of an affidavit of Paul J. Schaefer, to be marked Exhibit "G" to the Response filed herein. This request is granted, and said amendment, consisting of said affidavit, is filed in open court.

The applicant asks leave to file the affidavit of Harry Campbell, Jr., which request is granted, and said affidavit is filed in open court.

Both parties then announce ready for hearing, and the applicant stated that he did not desire to offer any oral evidence or evidence other than the verified application and the affidavit of the said Harry J. Campbell, and the Respondent stated that it desired to offer no oral evidence, but submitted the cause upon its verified Response and the affidavits filed as exhibits thereto.

76 The Court thereupon heard argument of counsel, and after the hearing of such argument directed Charles Diffendaffer, the Court Reporter who had reported all of the argument, to transcribe the same and file such transcript with the Court, and directed that the cost of such transcript be divided equally between the parties.

The Court then took said cause under advisement and informed counsel that they would be given notice of the time when judgment would be entered herein.

It Is Therefore Ordered and Decreed that said cause be and the same is hereby submitted for judgment and is by the Court taken under advisement.

EUGENE RICE, Judge.

O.K. as to form:

.....

EARL STREET,
Attorneys for Applicant.
CHAS. A. MOON,
Attorney for Respondent.

Filed March 9, 1944. John H. Pugh, Clerk, U. S. District Court.

Amendment to Response.

77 Comes now the Respondent, and for Amendment to the Return to Order to Show Cause and Response to Application to Compel the Production of Documents and Records, filed herein by it on the 7th day of March, 1944, attaches hereto the affidavit of Paul J. Schaefer, dated March 9, 1944, as its Exhibit "G", and makes the same a part of its Response, and requests that it be read and considered as a part of said original Response filed herein.

Wherefore Respondent prays:

1. That the Order entered herein on January 29, 1944, requiring Respondent to appear before this Honorable Court to show cause, etc., be vacated, and

2. That this proceeding be dismissed.

J. C. STONE,
CHAS. A. MOON,
Attorneys for Respondent.

Filed in Open Court March 9, 1944. John H. Pugh, Clerk, U. S. District Court.

Exhibit G.

Affidavit.

State of Oklahoma, Muskogee County, ss.

78 Paul J. Schaefer, being duly sworn, deposes and says:

I am a resident of the County of Muskogee and State of Oklahoma. For a period of 17 years last past I have been continuously and am now Circulation Manager of the Muskogee Daily Phoenix and the Muskogee Times-Democrat, the two newspapers published at Muskogee, Oklahoma, by the Oklahoma Press Publishing Company, a corporation organized under the laws of the State of Oklahoma.

That during said period I have been and am now thoroughly familiar with the circulation department of said newspapers and the operation of said department, and with the circulation and distribution of said papers. That the approximate average number of copies of the Muskogee

Daily Phoenix mailed daily to Respondent's out of state representatives for its foreign advertisers is 36, and that the approximate average number of copies of the Muskogee Times-Democrat mailed daily to Respondent's out of state representatives for its foreign advertisers is 31. That for said copies so mailed no charge is made and no compensation is received.

PAUL J. SCHAEFER

Subscribed and Sworn to before me this 9th day of March, 1944. Freda Ungar, Notary Public. My commission expires: Dec. 13, 1947. (Seal).

Affidavit.

State of Texas, County of Dallas, ss.

79 Harry Campbell, Jr., of lawful age, being first duly sworn, on oath says;

That he is one of the attorneys of record for L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, the petitioner herein; that he did prepare the subpoena duces tecum served on the respondent herein on January 31, 1944 in this affiant's office at Dallas, Texas on the 12th day of October, 1943, and did forward said subpoena duces tecum to the said L. Metcalfe Walling, Administrator, on the said date, that said subpoena at the time it was forwarded to the said L. Metcalfe Walling, Administrator, was complete except for the space for the signature of the said L. Metcalfe Walling, Administrator, and for the place and date the said signature was appended, that he is familiar with the signature of the said L. Metcalfe Walling and that the signature appended to the said subpoena duces tecum is his signature.

Further affiant saith not.

HARRY CAMPBELL, JR.

Subscribed and Sworn to Before Me This 8th Day of March 1944. E. F. Roberson—Notary Public. (Seal).

Filed March 9, 1944. John H. Pugh, Clerk, U. S. District Court.

Findings of Fact and Conclusions of Law.

I.

80 The hearing herein was upon the Response of the Oklahoma Press Publishing Company, a corporation (hereinafter referred to as the Company) to an Order to Show Cause issued herein. The Order to Show Cause was issued upon the application of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor (hereinafter referred to as Administrator) proceeding under the Wage and Hour Act (hereinafter referred to as the Act), 29 U.S.C.A. 211(a), also Section 209 which makes applicable to such proceedings the procedure provided for in 15 U.S.C.A. 49-50.

II.

The proceedings leading up to the filing of the application are as follows: A representative of the Administrator requested of a representative of the Company the right to inspect and examine their books, papers and records for the purpose of determining whether or not the Company was complying with the Act. This request was refused. Whereupon, a subpoena duces tecum was issued by the Administrator, requiring the Company to appear at a designated place and time and to produce the following books, papers and documents: "all of your books, papers and documents showing the hours worked by and wages paid
81 to each of your employees between October 28, 1938, and the date hereof, including all payroll ledgers, time sheets, time cards, and time clock records, and all your books, papers and documents showing the distribution of papers outside the State of Oklahoma, the dissemination of news outside the State of Oklahoma, the source and receipt of news from outside the State of Oklahoma, and the source and receipt of advertisements of nationally advertised goods."

III.

The Company refused to respond to the subpoena duces tecum, taking at all times the position that is reflected by the Response filed herein. Briefly summarized, the position of the Company is that the Act is not applicable to newspapers, and if so, it is unconstitutional; that the Company

is not engaged in commerce or in the production of goods for commerce within the meaning of the Act; and that its employees are not engaged in commerce or in the production of goods for commerce.

IV.

No oral testimony was produced at the hearing. The cause was submitted to the court upon the affidavits of the respective parties. Essentially, there is no dispute as to the facts. The Company does not dispute the fact that the Administrator or his representative took the steps that are set forth and alleged in the Application for an Order to Show Cause. The Company admits that it refused to respond to the subpoena duces tecum. On the other hand, the Administrator admits, for the purpose of this hearing, that the Company conducts its business as set forth in the affidavits attached to its response.

V.

The essential facts in regard to the Company and the manner in which it conducts its business are as follows:

82 The Company is the owner of and publishes two newspapers in the City of Muskogee—one a morning paper, the Muskogee Daily Phoenix; the other an evening paper, the Muskogee Times-Democrat. The total net paid circulation of the Muskogee Daily Phoenix as of September, 1943, was 12,172. The total net paid circulation of the Muskogee Times-Democrat as of said date was 9,491. Of this circulation, 9,120 of the Muskogee Daily Phoenix, and 6,748 of the Muskogee Times-Democrat were in Muskogee County, Oklahoma. No other newspaper printed and circulated within Muskogee County, Oklahoma, or within the immediate territory of Muskogee County, Oklahoma, has a paid circulation in excess of 3,000. Since June 1, 1939, no papers have been sold by the Company to persons outside the State of Oklahoma, unless it might be said that the sending of papers to out-of-state advertisers constitutes a sale, although no sum is paid for the papers as such. The Company mailed, without charge, to former Muskogee residents in the armed forces approximately 120 copies of the Muskogee Daily Phoenix, and approximately 17 copies of the Muskogee Times-Democrat. The Company also mails to its out-of-state representative for advertisers a copy of

each paper for each foreign advertiser. The number of papers so sent is approximately 67 daily. The Company receives its news in the usual manner. Out-of-state news is received over telegraphic wires by means of an automatic teletype machine which requires no one to operate. The Company then selects that part of such news as is desired and publishes it, discarding the remainder. Its out-of-state ads are received through the United States mail, a large part thereof being in the form of mats and electrotype plates. The Company deals with an out-of-state representative in handling this out-of-state advertising. The advertisers pay the out-of-state representative, and the out-of-state representative in turn pays the Company, after deducting his commission. At the hearing, the Company admitted that much of its newspaper supplies, paper, machinery, etc., are purchased outside the State of Oklahoma.

VI.

83 The affidavits of the Respective parties are hereby made a part of the findings of fact by reference. It has been the purpose of the court to include in this statement the essential facts for decision herein. If any fact contained in the affidavits has been omitted it is hereby incorporated herein by reference and made a part hereof.

Conclusions of Law.

I.

Under the provisions of the Act, and under the facts admitted herein, the application of the Administrator to this court for an Order to Show Cause was proper, and this court has jurisdiction of the proceedings, and the Order to Show Cause was properly issued. Lowell Sun Co. v. Fleming, 120 Fed. 2d, 213.

II.

Since this cause was submitted, the Supreme Court of the United States has denied certiorari in Sun Publishing Co. v. Walling, Wage and Hour Administrator, (6th C.C.A.), 140 Fed. 2d, 445. That case, in the court's opinion, is decisive of every issue raised by the Company herein. The facts in that case are almost identical with the facts herein, with the exception that the newspaper involved in the Sun

Publishing Case had a small number of out-of-state subscribers, the number being approximately 200. The Sun Publishing Company, like the Company herein, sent copies of its paper to national advertisers. The only distinction in the two cases is the fact that the Sun Publishing
84 Company Case had 200 out-of-state paid subscribers; the Company herein has approximately 140 persons in the armed forces outside the state to whom it sends its papers complimentary. The fact that the papers are sent complimentary does not warrant a different conclusion as to applicability of the Act. See also, Associated Press v. National Labor *Relation* Board, 301 U. S. 103.

III.

Under the authority of the Sun Publishing Company Case, the court holds that the Company herein is subject to the Wage and Hour Act; that the Order to Show Cause issued herein was properly issued; that the Company has not shown cause why it should be relieved from complying therewith; and the Company is directed to comply with the subpoena duces tecum issued by the Administrator at a date to be fixed in the decree of this court.

IV.

The attorney for the Administrator is directed to prepare a proper decree in conformity with the views expressed herein, serve a copy thereof upon the attorney for the Company, and present to the court for entry at Muskogee on Monday, June 12, 1944, at 10 o'clock A. M.

EUGENE RICE, Judge.

Filed June 2, 1944. John H. Pugh, Clerk, U. S. District Court.

Order.

85 Now, on this 12th day of June, 1944, the above-styled and numbered cause came duly on for hearing on the application of L. Metcalfe Walling, Administrator of the Wage and Hour Division of the United States Department of Labor, for an order of this Court requiring the pro-

duction of documentary evidence by the Oklahoma Press Publishing Company, a corporation, pursuant to subpoena, and the Administrator, aforesaid, appearing by his duly authorized counsel of record, Earl Street, and the said Oklahoma Press Publishing Company, a corporation, appearing by its duly authorized attorney of record, Charles A. Moon; and the Court having examined the said application and affidavits, attached thereto and in support thereof, and the response filed herein by the said Oklahoma Press Publishing Company, a corporation, and having heard the argument of counsel and being fully advised in the premises, finds that an order should be issued as prayed for;

It is, therefore, Ordered, Adjudged and Decreed that the said Oklahoma Press Publishing Company, a corporation, and its officers, agents, employees and attorneys and all other persons acting in its behalf and interest be, and they hereby are, directed to give full and complete access to the books and records prayed for in the subpoena served on them by the Administrator, above-named, as follows:

All books, papers and documents showing the hours worked by, and the wages paid to, each of the employees of the said Oklahoma Press Publishing Company engaged in the publication and distribution of the Muskogee Daily Phoenix and the Muskogee Times-Democrat between October 24, 1938, and the date hereof, including all pay roll ledgers, time sheets, time cards and time clock records, and all books, papers and documents showing the distribution of copies of the said Muskogee Daily Phoenix and the Muskogee Times-Democrat outside the State of Oklahoma, the source and receipt of news from outside the State of Oklahoma, and the source and receipt of advertisements of nationally advertised goods,

and that such access be given until a full inspection thereof has been completed.

EUGENE RICE,
United States District Judge.

Filed June 12, 1944. John H. Pugh, Clerk, U. S. District Court.

Notice of Appeal.

86 Notice is hereby given that the Oklahoma Press Publishing Company, a corporation, Respondent in the above entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Tenth Circuit from the order, judgment and decree entered herein on the 12th day of June, 1944.

Dated this 12th day of June, 1944.

J. C. STONE,
CHAS. A. MOON,
Attorneys for Appellant.

Filed June 12, 1944. John H. Pugh, Clerk, U. S. District Court.

Motion for Supersedeas.

87 Comes now the Oklahoma Press Publishing Company, a corporation, Respondent herein, and moves the Court to stay the enforcement of the order, judgment and decree entered herein on the 12th day of June, 1944, pending the disposition of Respondent's appeal to the United States Circuit Court of Appeals for the Tenth Circuit, and for that purpose to fix the amount of the Supersedeas Bond required to be filed by the Respondent.

J. C. STONE,
CHAS. A. MOON,
Attorneys for Respondent.

Filed June 12, 1944. John H. Pugh, Clerk, U. S. District Court.

Order Granting Supersedeas.

88 On this 12th day of June, 1944, this cause comes on to be heard on motion of the Oklahoma Press Publishing Company a corporation, Respondent herein, for a stay pending Respondent's Appeal to the United States Circuit Court of Appeals for the Tenth Circuit, and it appearing to the Court that Respondent is entitled to such stay,

It Is Ordered That execution of any *any* proceedings to enforce the order, judgment and decree entered herein on the 12th day of June, 1944, be stayed, pending the determination of Respondent's appeal from such order, judgment and decree, upon the filing by Respondent and approval by this Court of a Bond in the sum of Five Hundred and 00/100 ($500.00) Dollars, said Bond to be filed within 10 days from this date.

EUGENE RICE, Judge.

Filed June 12, 1944. John H. Pugh, Clerk, U. S. District Court.

Supersedeas Bond.

Know All Men By These Presents;

89 That we, Oklahoma Press Publishing Company, a corporation, as Principal, and Tams Bixby, Jr., and Franklin E. Katterjohn, as Sureties, are held and firmly bound unto L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, in the full and just sum of Five Hundred and 00/100 ($500.00) Dollars, to be paid to the said L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, his successors and assigns, for which payment well and truly to be made we bind *outselves*, our successors, heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 12th day of June, 1944.

Whereas on the 12th day of June, 1944, a judgment and decree was entered in the above entitled cause by the United States District Court for the Eastern District of Oklahoma, against the Oklahoma Press Publishing Company, a corporation, from which judgment and decree said corporation has appealed to the United States Circuit Court of Appeals for the Tenth Circuit,

Now, the condition of this obligation is such that if the said Oklahoma Press Publishing Company, a corporation, shall prosecute its appeal to effect and shall satisfy the judg-

ment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, or shall satisfy in full such modification of the judgment and such costs, interest and damages as the Circuit Court of Appeals may adjudge and award, and shall in all things abide the final judgment in this cause, then this obligation to be void; otherwise to remain in full force and effect.

OKLAHOMA PRESS PUBLISHING COMPANY,
By TAMS BIXBY, JR., President.
Principal.
TAMS BIXBY, JR.,
FRANKLIN E. KATTERJOHN,
(Seal) Sureties.

Attest:
HAZEL H. JOHNSON, Secretary.

Acknowledgment.

State of Oklahoma, Muskogee County, ss.

90 Before me, the undersigned, a Notary Public in and for said County and State, on this 12th day of June, 1944, personally appeared Tams Bixby, Jr. and Franklin E. Katterjohn to me known to be the identical persons who executed the within and foregoing instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed, for the uses and purposes therein set forth.

Witness my hand and official seal the day and year last above written.

(Seal) LA MONA BLAIR, Notary Public.

My commission expires: April 5, 1947.

The foregoing Supersedeas Bond is hereby approved this 12th day of June, 1944.

EUGENE RICE, Judge.

Filed June 12, 1944. John H. Pugh, Clerk, U. S. District Court.

Designation of Contents of Record on Appeal.

91 Comes now the Oklahoma Press Publishing Company, a corporation, Respondent herein, and hereby designates the complete record and all the proceedings, evidence and admissions in this action, and requests that the same be included and contained in the record on appeal, including the following, to-wit:

(1) The application to compel the production of documents and records, filed in this Court on January 29, 1944;

(2) The Order to Show Cause, entered herein on January 29, 1944, and the United States Marshal's return thereon;

(3) The Respondent's Return to Order to Show Cause, and Response to Application to Compel the production of documents and records, together with all exhibits thereto attached;

(4) The Amendment to the Response filed by the Respondent, and the Affidavit of Paul J. Schaeffer thereto attached;

(5) The additional affidavit of the Applicant, filed March 9, 1944;

(6) The agreements and admissions made in open court on March 9, 1944;

(7) The Order of the Court, dated March 9, 1944;

(8) The Findings and Conclusions of the Court filed herein;

(9) The Judgment entered herein June 12, 1944;

(10) The Notice of Appeal filed June 12, 1944;

(11) The Motion for Supersedeas, filed June 12, 1944;

92 (12) The Order allowing Supersedeas and fixing Bond, entered June 12, 1944;

(13) The Supersedeas Bond filed and showing the approval thereof by the Judge on June 12, 1944;

(14) All other parts of the record necessary to make a

complete record and all the proceedings and evidence in the action.

CHAS. A. MOON,
Attorney for Oklahoma Press Publishing Company, a corporation.

Filed June 13, 1944. John H. Pugh, Clerk, U. S. District Court. By B. L., Deputy Clerk.

Certificate of Clerk.

United States of America, Eastern District of Oklahoma, ss.

93 I, John H. Pugh, Clerk of the United States District Court in and for the Eastern District of Oklahoma, do hereby certify that the annexed and foregoing is a true and correct copy of the original pleadings and proceedings in civil action No. 1166; In the Matter of the Application of L. Metcalfe Walling, Administrator of the Wage and Hour Division; as is called for in the designation of the contents of the record filed herein, and now remaining among the records of the said court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Muskogee, Oklahoma this 8th day of July, 1944.

JOHN H. PUGH, Clerk, U. S. District Court.
(Seal) By: RANDOLPH KIZZIRE, Deputy Clerk.

Filed July 19, 1944. Robert B. Cartwright, Clerk.

And thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Tenth Circuit:

Order of Submission.

Third Day, November Term, Wednesday, November 15th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard and was argued by counsel. Elisha Hanson, Esquire, and Charles A. Moon, Esquire, appearing for appellant, Douglas B. Maggs, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

Opinion.

[February 15, 1945.]

Elisha Hanson (Joseph C. Stone and Charles A. Moon were with him on brief) for Appellant.

Douglas B. Maggs (Bessie Margolin, Llewellyn B. Duke and Flora G. Chudson were with him on brief) for Appellee.

Before Phillips, Bratton and Murrah, Circuit Judges.

Murrah, Circuit Judge, delivered the opinion of the court.

The primary question presented by this appeal is whether the Administrator of the Wage and Hour Division of the Fair Labor Standards Act (52 Stat. 1060, 29 USCA 201, et seq.) is entitled to an order of the District Court enforcing an investigatory subpoena, issued by the Administrator in pursuance of Section 9 of the Act, for the purposes enumerated in Section 11(a) thereof, without a prior adjudication by the court to the effect that the industry or activity sought to be investigated by the subpoena is subject to and covered by the provisions of the Fair Labor Standards Act, and if so, what considerations govern the court in the enforcement of the subpoena.

Section 11(a) of the Act authorizes the Administrator to "investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and [he] may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provisions of this Act". Section 11(c) requires every employer subject to any provision of the Act to make and keep records of wages, hours, and other conditions of employment and to make reports therefrom, as prescribed by regulations of the Administrator, "necessary or appropriate for the enforcement of the provisions of the Act".

When permission to "enter and inspect", as authorized by Section (11)(a) is denied to the Administrator or his subordinates, the Administrator is authorized by Section 9 of the Act (which adopts sections 9 and 10 of the Federal Trade Commission Act, 38 Stat. 717, 15 USCA 41-49) to issue a subpoena requiring the attendance and testimony of witnesses and the production of all documentary evidence relevant to any matter under investigation authorized by Section 11(a), at any designated place of hearing. In the event of disobedience to the subpoena, the Administrator may invoke the aid of any court of the United States having jurisdiction of the subpoenaed party, and such court may issue an order requiring the recalcitrant witness to obey the subpoena. Failure to obey such order of the court is punishable as a contempt thereof.

After being denied permission to examine the books and records of the appellant, Oklahoma Press Publishing Company, under Section 11(a) of the Act, the Administrator issued a subpoena duces tecum, directed to the appellant, requesting the production of "books, papers, and documents showing the hours worked by, and wages paid to, each of your employees between October 29, 1938, and the date hereof, including all payroll ledgers, time sheets and cards, and time clock records, and all your books, papers and documents showing the distribution of papers, out of the state of Oklahoma, the dissemination of news outside of the state

of Oklahoma, and the source and receipt of advertisements of nationally advertised goods". Acting upon the belief that neither it nor its employees were "subject to the Act", appellant refused to obey the subpoena, whereupon the Administrator applied to the District Court for an order compelling obedience as authorized in Section 9.

The application alleged on information and belief, that the appellant, as publisher of two daily newspapers, was engaged in commerce or in the production of goods for commerce within the meaning of the Act, and that all the books, records, papers and documents referred to in the subpoena were "relative, material, and appropriate" to determine whether the company had violated the Act, and would "aid in the enforcement of the provisions of the Act". By answer to the show cause order, appellant alleged that neither it nor any of its employees were engaged in commerce or in the production of goods for commerce; that a forced investigation would be an unreasonable search and seizure, and moreover, any attempted regulation of its business violated the freedom of the press. In the alternative, it was alleged that if appellant or any of its employees are engaged in commerce or in the production of goods for commerce, as a newspaper publisher, it is a service establishment as defined by Section 13(a)(2) of the Act and therefore exempt from its coverage.

The application for the enforcement order was submitted to the trial court upon the foregoing pleadings and accompanying affidavits. Upon the facts thus established and on authority of Sun Publishing Company v. Walling, 140 F. 2d 445, the trial court adjudged the appellant "subject to the Wage and Hour Act", and upon this premise ordered appellant to comply with the subpoena.

On appeal appellant makes the contention that compulsory obedience to the investigatory subpoena constitutes an unreasonable search and seizure, unless the court first adjudicates the question of coverage, and that the summary proceedings pursuant to which the trial court ordered obedience to the subpoena did not afford it an opportunity to have the question of coverage determined in a full and complete proceedings conducted for that purpose. In other

words, it is argued that the appellant may bar the investigator at the threshold until it is conclusively shown that the matters and things sought to be investigated by the subpoena are within the scope of the Act, which authorizes its issuance. Relying upon Endicott-Johnson v. Perkins, 317 U. S. 501, the Administrator makes the contention that he is entitled, as of right, to an order of enforcement upon the bare allegations contained in his application for the order, without any further showing of coverage—that any less expeditious assistance would greatly hinder the effectuation of the purposes of the Act. It is further urged that in any event, the showing made in the summary proceedings was entirely sufficient to justify the order of enforcement.

In order to effectuate the purposes of the Act, the Administrator is authorized to "enter", "inspect" and "investigate", and when denied permission he may issue a subpoena requiring the appearance and testimony of witnesses, and the production of the documentary evidence sought to be inspected, but the Administrator has no power to compel obedience to the subpoena—such powers have historically resided in the courts as an appropriate exercise of a judicial function.[1] Interstate Commerce Commission v. Brimson, 154 U. S. 447. Like most acts of similar import (see footnote 1), Section 9 which confers jurisdiction, provides that the court "may . . . issue an order requiring" obedience to the subpoena.[2] "The language is not mandatory but permissive". Mississippi Road Supply v. Walling, 136 F. 2d 391. It clearly envisages a judicial act, and in the clas-

[1] The following acts of Congress creating administrative agencies and tribunals with subpoena power specifically delegate to the courts the power to enforce the subpoenas. Interstate Commerce Act, 41 Stat. 484 (49 USCA 12(3)); Federal Power Act, 49 Stat. 863 (16 USCA 825f(c)); Merchant Marine Act, 52 Stat. 954 (46 USCA 1124(b)); Veterans Administration Act, 49 Stat. 2033 (38 USCA 133); Walsh-Healey Act, 49 Stat. 1921 (41 USCA 39); Railroad Unemployment Ins. Act, 54 Stat. 199 (45 USCA 362(b)); Securities Act of 1933, 49 Stat. 1921 (15 USCA 77v(b)); Securities Exchange Act of 1934, 49 Stat. 1921 (15 USCA 77u(b)); Public Utility Holding Co. Act, 49 Stat. (15 USCA 79r(d)); National Labor Relations Act, 49 Stat. 1921 (29 USCA 161(2)). See also the Enforcement of Administrative Subpoenas, 44 Columbia Law Review, July 1944, p. 531.

[2] With the exception of the National Labor Relations Act and the Walsh-Healey Act, which merely confer jurisdiction upon the courts to issue an order requiring obedience to the subpoena, and the Railroad Unemployment Insurance Act, which provides that the court "shall" issue an order compelling obedience to the subpoena. See footnote 1.

sical words of Judge Johnsen of the 8th Circuit, "judicial enforcement is necessarily the exercise of judicial power and judicial function can never wholly escape the test of judicial responsibility". Walling v. Benson, 137 F. 2d 501.

Endicott-Johnson v. Perkins, supra, involved the relationship of the courts to the subpoena power of the Secretary of Labor under Section 4 of the Walsh-Healey Public Contracts Act. The Circuit Court of Appeals (128 F. 2d 208), and the Supreme Court (317 U. S. 501), held that in the circumstances, the District Court should have enforced the subpoena, but we do not understand that in so holding it intended to sweep away all power of judicial discretion. In reaching its decision, the court noted that the Walsh-Healey Act had peculiar application to those doing business by voluntary contract with the United States Government; that under its provisions the issue of coverage was primarily the duty of the Secretary of Labor and not the courts, and that since the evidence sought by the subpoena was not plainly incompetent or irrelevant to the discharge of that lawful function, it was the duty of the court to order the production of the records sought by the subpoena. Unlike the Walsh-Healey Act, the ultimate issue of coverage under the Fair Labor Standards Act is a judicial question committed to the courts and not to the Administrator. We do not think that the philosophy of Endicott-Johnson v. Perkins, supra, is authority for the contention of the Administrator to the effect that the courts are deprived of the power of discretion in the performance of the judicial function expressly committed to them and denied to the Administrator.

It is, of course, fundamental that any invasion or intrusion upon the privacy of an individual's business or home must have the sanction of both constitutional and legislative authority, and any process issued for that purpose must confine its requirements within the limits which reason would impose under the circumstances of the case. Bowles v. Beatrice Creamery Co., 10th Cir., . . . F. 2d . . .; Shotkin v. Nelson, 10th Cir., . . . F. 2d . . . .; McGarry v. Securities and Exchange Commission, . . . F. 2d . . .; Fleming v. Montgomery Ward & Co., 7th Cir., 114 F. 2d 384; Wilson v. United States, 221 U. S. 361; Essgee Co. v. United States, 262 U. S. 151; Federal Trade Commission v. American

Tobacco Co., 264 U. S. 298. See also Cooley's Constitutional Limitations, page 610.

In delineating the proper functions of the courts in the exercise of their jurisdiction to enforce subpoenas in aid of investigatory powers of administrative agencies, the courts as well as Congress have recognized the duty to guard against the evils which inevitably spring from the injudicious exercise of the power to issue an investigatory subpoena. See Interstate Commerce Commission v. Brimson, 154 U. S. 447; Boyd v. United States, 116 U. S. 616; Hale v. Henkel, 201 U. S. 43; Federal Trade Commission v. American Tobacco Co., 264 U. S. 298; Cudahy Packing Co. v. Holland, 315 U. S. 357. It is said that constitutional provisions prohibiting unreasonable search and seizure "should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly overzealous executive officers". Gouled v. United States, 255 U. S. 298, 304. But they must be construed so as to serve the public interest as well as individual rights. Carroll v. United States, 267 U. S. 132. Especially is this true where, as here, the law regulates that which it seeks to investigate. Wilson v. United States, 221 U. S. 361, 384; Fleming v. Montgomery Ward & Co., 114 F. 2d 384; Rodgers v. United States, 138 F. 2d 992. To again borrow the language of Judge Johnsen in Walling v. Benson, supra, "In a field of declared public interest—such as the Fair Labor Standards Act clearly is—the courts must give full, facilitating co-operation to the exercise of authorized administrative powers and duties, if no possible threat to fundamental rights and concepts is involved. But, in their desire to measure up to this obligation, they must not sweep aside the fundamental and inherent concept that a judicial responsibility is owing for any judicial function that they are called upon to perform—a responsibility that necessarily must soundly cover (but not attempt to extend beyond) the scope of the required function."

An officer of the law is entitled to invade the privacy of one's home on the authority of a warrant issued by a magis-

trate upon an affidavit of probable cause, and the person whose home is searched is afforded no opportunity to be heard concerning the validity of the warrant or the unreasonableness of the search until after it has been made, and he is called upon to answer for a criminal offense based thereon. See Gouled v. United States, 255 U. S. 298; Dumbra v. United States, 268 U. S. 435. Surely it is not argued that the right of a person to be secure in his business from an unreasonable investigation under an administrative subpoena is greater or more sacred than the right of a person to be secure from unreasonable search and seizure in the privacy of his home. The rule of probable cause has always been deemed an adequate safeguard against unreasonable search and seizure and we think the measure of protection it affords fulfills the spirit of the constitutional guaranty in civil cases of this kind.

When judged by this test, it is plain that the appellant is not entitled to an adjudication of actual coverage as a prerequisite to the enforcement of the subpoena, rather the orderly and efficient enforcement of the Act within the framework of the constitutional rights of the parties involved, require only that the District Court have "the assurance that it is not giving judicial sanction and force to unwarranted and arbitrary action, but that reasonable grounds exist for making the investigation". Walling v. Benson, 137 F. 2d 501.[3] In judicially determining whether an investigation sought by an administrative subpoena is constitutionally reasonable, it is essential to consider whether the testimony and the data sought to be produced are pertinent to an inquiry which the Administrator is authorized by law to conduct in order to perform the functions imposed upon him by the Act. Shotkin v. Nelson, 10th Cir., . . . F. 2d . . .; McGarry v. Securities and Exchange Commission, 10th Cir., . . . F. 2d . . .

The Administrator is statutorily charged with the primary duty of enforcing the wage and hour provisions of the Fair Labor Standards Act, and to that end he is authorized by Section 11(a) to investigate and gather data regarding

[3] In arriving at this conclusion we are not unmindful of the contra view expressed in General Tobacco and Grocery Co. v. Fleming, 125 F. 2d 596, 140 A.L.R. 783.

the "wages, hours, and other conditions and practices of employment in any industry subject to the Act". This particular prerogative is addressed to an industry as a whole and presupposes that the industry is "subject to the Act", but the Administrator is also empowered to enter, inspect and investigate such conditions, practices or matters which he may deem necessary or appropriate to determine whether any person has violated the Act, or to conduct any investigations which may aid in the enforcement of the provisions of the Act. Walling v. Standard Dredging Corp., 44 F. Supp. 601, affirmed 132 F. 2d 918; Walling v. American Rolbal Corp., 135 F. 2d 1003. This phase of the investigatory powers does not presuppose coverage, but is to enable the Administrator to determine whether any employer or employee is subject to the Act, and if the Act has been violated.

The subpoena in this case sought to compel the production of data in respect to the hours worked and wages paid to appellant's employees which is relevant to the question whether any provision of the Act had been violated. The subpoena also sought the production of data pertaining to the interstate activities of the appellant, which obviously relate to the question whether it or any of its employees is engaged in commerce or in the production of goods for commerce, and are therefore subject to the Act. To hold that the Administrator cannot compel the production of data relating to coverage until that question has been conclusively determined, is to deny him the very powers deemed necessary in order to effectuate the purposes of the Act.

The application for the enforcement order alleged that upon information and belief the appellant was subject to the Act and that it was violating the wage and hour provisions thereof. By the subpoena the Administrator purposed to obtain data which upon the issue of coverage and violations would ultimately be judicially determined. When the matter was submitted to the trial court on the rule to show cause, it concluded coverage, but it did not have to go that far. It was sufficient if the application and accompanying affidavits furnished reasonable grounds for the belief that appellant or any of its employees were subject to the Act. In these circumstances it became the inescapable duty

of the court to compel obedience to the subpoena. The ultimate question of coverage or violations was not presented on the record before the trial court, nor is it presented or decided here. It is time enough to consider that question when all the evidence sought to be produced by the subpoena is before the court in a proceeding directly involving violations based on coverage.

"The publisher of a newspaper has no special immunity from the application of general laws," Associated Press v. Labor Board, 301 U. S. 103, including the Fair Labor Standards Act, Sun Publishing Company v. Walling, 140 F. 2d 445, and uniform regulations imposed upon those covered by the Fair Labor Standards Act are not an abridgement of the freedom of the press.

The judgment is AFFIRMED.

Judgment.

Forty-eighth Day, November Term, Thursday, February 15th, A. D. 1945, Before Honorable Orie L., Phillips, Honorable Sam G. Bratton and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

Order Staying Mandate.

Fifty-fifth Day, November Term, Monday, February 26th, A. D. 1945. Before Honorable Orie L. Phillips, Circuit Judge.

This cause came on to be heard on the motion of appellant for a stay of the mandate herein to and including April 25, 1945.

On consideration whereof, it is now here ordered that

said motion be and the same is hereby granted and that no mandate of this court issue herein on or before April 25, 1945, and that, if within said period of time there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under section 3 of rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

Clerk's Certificate.

United States Circuit Court of Appeals, Tenth Circuit.

I, Robert B. Cartwright, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify the foregoing as a full, true, and complete copy of the designated transcript of the record from the District Court of the United States for the Eastern District of Oklahoma, and full, true, and complete copies of certain pleadings, record entries and proceedings, including the opinion (except full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said United States Circuit Court of Appeals, No. 3036, wherein Oklahoma Press Publishing Company, a corporation, was appellant, and L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, was appellee, as full, true, and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 20th day of March, A. D. 1945.

(Seal, U. S. Circuit Court of Appeals, Tenth Circuit)

ROBERT B. CARTWRIGHT,
Clerk of the United States Circuit Court of Appeals, Tenth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 21, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9605)

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FILED
APR 16 1945
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. [redacted] 61

OKLAHOMA PRESS PUBLISHING COMPANY,

Petitioner,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ELISHA HANSON,
729 Fifteenth Street, N. W.,
Washington 5, D. C.,
JOSEPH C. STONE,
CHARLES A. MOON,
1010 Barnes Building,
Muskogee, Oklahoma,
Attorneys for Petitioner.

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Walsh-Healey Act (49 Stat. 2036, 41 U. S. C. 35 *et seq.*) 12, 13

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.

OKLAHOMA PRESS PUBLISHING COMPANY,
Petitioner,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Oklahoma Press Publishing Company respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review a decree of said court entered on February 15, 1945 (R. 71), enforcing an order of the District Court for the Eastern District of Oklahoma entered June 12, 1944, in a proceeding brought by the Administrator of the Wage and Hour Division, United States Department of Labor, to enforce an alleged subpoena duces tecum issued by the Administrator in pursuance of Section 9 of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. 201 *et seq.*).

The opinion of the District Court (R. 53-56) and of the Circuit Court of Appeals (R. 63-71) are as yet unreported.

A

Statement of the Matter Involved

Petitioner is engaged at Muskogee, Oklahoma, in the business of publishing two daily newspapers—the Muskogee Daily Phoenix which is published each morning and the Muskogee Times-Democrat which is published each evening except Sundays (R. 54). The total net paid circulation of the Muskogee Daily Phoenix as of September, 1943, was 12,172 (R. 44, 54). The total net paid circulation of the Muskogee Times-Democrat as of the same date was 9,491. Since June 1, 1939, no papers have been sold by petitioner outside the state of Oklahoma (R. 44, 54). Petitioner mails daily, without charge, to Muskogee residents now in the armed forces approximately 17 copies of the Muskogee Times-Democrat and 120 copies of the Muskogee Daily Phoenix (R. 20, 42, 45-46, 54). Petitioner also mails, without charge, approximately 67 copies to its out of state representative for advertisers (R. 20, 42-43, 46, 54-55).

On June 3 and 4, 1943, one Erle P. Bryan, representing himself to be a duly authorized representative of the Administrator of the Wage and Hour Division, appeared at petitioner's office and sought to make an inspection of petitioner's books and records. Petitioner refused to permit any such search (R. 10, 20-21).

On November 3, 1943, a duplicate original of a paper purporting to be a subpoena duces tecum signed by L. Metcalfe Walling, Administrator of the Wage and Hour Division, requiring petitioner to appear before officers of the Wage and Hour Division on November 17, 1943, to produce certain requested material was served upon one Franklin E. Katterjohn (R. 7, 21). Said Katterjohn was not and never has been a stockholder, director or officer of petitioner and has no control over the books, records and documents de-

scribed in said purported subpoena duces tecum (R. 21-22). No one representing petitioner answered the purported subpoena duces tecum (R. 13-14).

L. Metcalfe Walling then made application to the District Court for the Eastern District of Oklahoma on January 29, 1944, for an order of enforcement of the aforesaid subpoena (R. 5-9).

Upon an ex parte showing the District Court issued an order directing petitioner to show cause on February 18, 1944, why an order should not issue requiring it to comply with the aforesaid subpoena (R. 14-15.) Time for filing an answer was extended to March 9, 1944.

In its return to the order to show cause and answer to the petition of the Administrator for enforcement of the purported subpoena petitioner denied essential jurisdictional facts, namely, that the Act is applicable to the business of petitioner; that the Administrator has jurisdiction over petitioner's affairs; and that the court had jurisdiction in the premises (R. 16-17). Petitioner also asserted as defenses that the attempted application of the Act to its business violated its rights as guaranteed by the First, Fourth and Fifth Amendments to the Constitution of the United States (R. 16-17).

The case was heard on March 9, 1944, by Judge Eugene Rice (R. 49-50). The District Court held that the order to show cause was properly issued and that petitioner was subject to the provisions of the Fair Labor Standards Act. On June 12, 1944, it entered an order requiring petitioner to give the Administrator access to the books and records prayed for in the subpoena (R. 56-57).

Petitioner appealed to the United States Circuit Court of Appeals for the Tenth Circuit. Argument on its appeals was heard on November 15, 1944, in Wichita, Kansas. On February 15, 1945, the Circuit Court affirmed the judgment of the District Court.

B

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U.S.C., Sec. 347(a)). The decree of the United States Circuit Court of Appeals to be reviewed was entered on February 15, 1945 (R. 71).

C

Constitutional and Statutory Provisions Involved

The constitutional provisions involved are Article I, Section 8, Clause 3 and the First, Fourth and Fifth Amendments to the Constitution of the United States. These provisions are set forth in the Appendix at page 17.

The statutory provisions are those embraced in the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U.S.C. Sec. 201 *et seq.*) and Sections 9 and 10 of the Federal Trade Commission Act (38 Stat. 722, 15 U. S. C. Sec. 41 *et seq.*). These provisions are set forth in the Appendix at page 18.

D

Questions Presented

1. Whether in a proceeding instituted for the purpose of compelling compliance with the commands of a subpoena duces tecum, the respondent therein in response to an order to show cause is barred from making the defense that it is not subject to the Act involved.

2. Whether, in light of the record before it, the Circuit Court of Appeals erred in failing to pass upon the merits of the case.

3. Whether Congress, in the light of the prohibition of the First Amendment against the abridgment of the free-

dom of the press by any form of restraint whatsoever, has the power to apply the Act to the newspaper publishing business of petitioner.

E.

Reasons Relied On for the Allowance of the Writ

1. The holding that the Administrator is entitled to an order enforcing an investigatory subpoena without a judicial adjudication that the industry sought to be investigated is subject to the Act is in conflict with the decision of the United States Circuit Court of Appeals for the Sixth Circuit in General Tobacco & Grocery Co. v. Fleming, 125 F. 2d 596 (1942).

The decision of the Tenth Circuit Court of Appeals in this case is in conflict with the holding of the Sixth Circuit Court of Appeals in the *General Tobacco* case that the Administrator is not entitled to an order enforcing a subpoena duces tecum without a determination that the industry sought to be investigated is covered by the Act. There is conflict among other Circuit Courts of Appeals on this question and on the effect of this Court's decision in *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501 (1943), on cases arising under the Fair Labor Standards Act. This question is an important one in the administration of the Act and should be decided by this Court.

2. The refusal of the Circuit Court of Appeals, in the light of the record before it, to pass on the merits of the case was arbitrary and capricious and should be reviewed by this Court.

The record in this case shows that the case was tried in the District Court on admissions and uncontradicted affidavits and that the District Court passed upon the question of coverage. The refusal of the Circuit Court to pass upon the merits of the case which were presented to it on appeal was arbitrary and capricious and should be reviewed by this Court.

3. The holding of the Circuit Court of Appeals that the application of the Act to the newspaper publishing business does not violate the constitutional guaranty of a free press is in conflict with the decision of this Court in Murdock v. Pennsylvania, 319 U. S. 105 (1943), and other cases.

The holding of the Circuit Court of Appeals that a newspaper has no special immunity from the application of general laws is in conflict with the decision of this Court in *Murdock v. Pensylvania, supra.* The application of this Act to newspapers would restrict circulation, and under decisions of this Court, restriction on circulation violates the free press guaranty. Further, the court below overlooked the fact that in enacting the Fair Labor Standards Act Congress did not treat all newspapers alike but attempted for purposes of regulation to classify the press on the basis of volume of circulation, frequency of issue and area of distribution in violation of the guaranties of the First and Fifth Amendments.

WHEREFORE, your petitioner prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Court of Appea for the Tenth Circuit, to the end that this cause may be reviewed and determined by this Court; that the decree of the said Court of Appeals be reversed by this Court; and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.

OKLAHOMA PRESS PUBLISHING COMPANY,

Petitioner,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Preliminary Statement

The opinions below, the statement of the matter involved, jurisdiction, and the questions presented appear in the Petition for a Writ of Certiorari herein and in the interest of brevity are incorporated here by reference.

II

Summary of Argument

Point 1. The holding of the Circuit Court of Appeals that the Administrator is entitled to an order enforcing an

investigatory subpoena without a judicial determination that the industry sought to be covered is subject to the Act is in conflict with the decision of the United States Circuit Court of Appeals for the Sixth Circuit in *General Tobacco & Grocery Co.* v. *Fleming*, 125 F. 2d 596 (1942). There is also conflict among the Circuit Courts of Appeals on the effect of this Court's decision in *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501 (1943), on the question of enforcing a subpoena without proof of coverage under the Fair Labor Standards Act. If the decision in the *General Tobacco* case is not sustained and a citizen is not allowed to test coverage under the Act before complying with a subpoena, a citizen may be subjected to unauthorized inspections in violation of rights guaranteed by the Fourth Amendment. A final determination of the question whether coverage under the Act may be tested in a hearing on an order to show cause is necessary both to insure uniform administration of the Act and to protect the constitutional rights of citizens.

Point 2. The record in this case shows that all of the facts necessary for a decision on the merits were before the court below. The District Court decided the question of coverage, and, on appeal, the Circuit Court of Appeals was urged to pass on this question. Its refusal to do so was arbitrary and capricious and will subject petitioner to unnecessary litigation.

Point 3. The holding of the Circuit Court of Appeals that the application of the Act to the newspaper publishing business does not violate the constitutional guaranty of freedom of the press is in conflict with decisions of this Court in *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943), and other cases. Application of this Act to newspapers would violate the First Amendment both by restricting circulation and by permitting Congress to regulate the press by classifying it.

III

Argument

POINT 1

The holding of the Circuit Court of Appeals that the Administrator is entitled to an order enforcing an investigatory subpoena without a judicial adjudication that the industry sought to be investigated is subject to the Act is in conflict with the decision of the United States Circuit Court of Appeals for the Sixth Circuit in General Tobacco & Grocery Co. v. Fleming, supra.

Section 11 (a) of the Act authorizes the Administrator to make investigations "in any industry subject to this Act" and Section 11 (c) requires that "every employer subject to any provision of this Act" shall make and keep certain records. The Administrator, purporting to act under authority conferred by this statute, issued an alleged subpoena duces tecum in an attempt to inspect petitioner's books and records without making any formal determination or showing that petitioner's business is an "industry subject to this Act" or that petitioner is an employer "subject to any provisions of this Act" (R. 33).

Petitioner refused to obey the alleged subpoena duces tecum on the ground that since neither it nor its employees were subject to the Act the Administrator was without authority to inspect its books and records. In its return and answer to the order to show cause in the District Court petitioner denied: that the Act is applicable to the business of petitioner; that the Administrator has jurisdiction over petitioner's affairs; and that the District Court had jurisdiction in the premises. It also alleged that the attempted application of the Act to its business violates its rights as guaranteed by the First, Fourth and Fifth Amendments to the Constitution (R. 16-17). Petitioner contended that these denials and allegations tendered issues of fact and law which the District Court was under a duty to determine at the outset of the proceedings. The District Court held

that petitioner was subject to the Act and ordered it to comply with the subpoena.

On appeal to the Circuit Court of Appeals, petitioner again contended that it was the duty of the court to pass upon the question of coverage before ordering compliance with the subpoena. Petitioner argued that a hearing on an order to show cause is only an empty form if at that time the respondent is not permitted to make any defense as to compliance with the Act or as to coverage. If a citizen is not permitted to try the issue of coverage at the time the Administrator seeks to inspect his business, he will have no way to prevent repeated inspections even though his business may not be subject to the Act. No lawful purpose could be served by permitting an unauthorized inspection. Therefore, the courts, the only forum in which coverage under the Act can be decided, should determine the question of coverage at the outset of the proceeding. It is axiomatic that the time to stop the trespasser is at the threshold.

The Circuit Court held, on authority of *Walling* v. *Benson*, 137 F. 2d 501 (1943), that petitioner was not entitled to an adjudication of actual coverage and that it was only necessary that the District Court should have assurance "reasonable grounds exist for making the investigation." The court also held that the Administrator's allegations on information and belief that petitioner was subject to the Act constituted reasonable grounds although petitioner had offered uncontradicted affidavits to show that it was not subject to the Act.

This decision is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *General Tobacco & Grocery Co.* v. *Fleming, supra.* In that case which arose under the same provisions of the Act as the controversy herein, the court held that where the answer of the respondent tenders an issue of fact on the jurisdictional question of interstate commerce the Administrator must show that

the respondent is engaged in interstate commerce or in the production of goods for commerce. The court said:

> "* * * It is unreasonable to assume that Congress intended that one who, when called upon to produce his books and records, denies that he is engaged in transactions within the purview of the Act should be refused a hearing upon that issue before his privacy is invaded in derogation of his individual immunity from unreasonable search of his papers and effects." (125 F. 2d at p. 599.)

It is submitted that the more recent decision of the Sixth Circuit Court of Appeals in *Walling* v. *LaBelle Steamship Co.*, 8 Wage and Hour Reporter 353, in no sense overrules its prior decision in the *General Tobacco Co.* case. In the *LaBelle Steamship Co.* case, respondent, admittedly engaged in interstate commerce, resisted an attempted investigation by the Administrator on the ground that its employees were exempt from the Act as seamen. The court, in holding that respondent was not entitled to have the issue of its individual employees tried in this proceeding, distinguished the case from the *General Tobacco Co.* case in which the employer denied that it was engaged in commerce or in the production of goods for commerce. Cases such as the *General Tobacco Co.* case and the present case, in which petitioner denied that it was engaged in commerce or in the production of goods for commerce and that it was subject to the Act, are clearly distinguishable from cases in which part of a business is subject to the Act and only certain employees are exempt from its provisions.

Furthermore, since the decision of the Tenth Circuit in the present case was announced, the Circuit Court of Appeals for the Third Circuit, in a decision announced March 5, 1945, divided two to one in a similar controversy, *Walling* v. *News Printing Co.*, 8 Wage and Hour Reporter 270. The majority of the court held that the Administrator's allega-

tions, on information and belief, that respondent was engaged in interstate commerce within the meaning of the Act and that he had reason to believe respondent was violating the Act, constituted a showing sufficient to entitle him to an order enforcing his subpoena. Judge McLaughlin, however, in a dissenting opinion, stated that the Act imposes on the district court, *at the very least*, the duty of satisfying itself that the Administrator has reasonable ground for believing respondent is subject to the Act and that mere assertions on information and belief do not constitute a showing. (Emphasis supplied.)

There is also conflict among the Circuit Courts of Appeals on the effect of this Court's decision in *Endicott Johnson Corp.* v. *Perkins, supra*, on the question of enforcing a subpoena without proof of coverage under the Fair Labor Standards Act. The First Circuit in *Martin Typewriter Co.* v. *Walling*, 135 F. 2d 918 (1943), and the Second Circuit in *Walling* v. *Standard Dredging Corp.*, 132 F. 2d 322 (1943), affirmed judgments enforcing subpoenas without proof of coverage on the authority of the *Endicott Johnson* case. Both of these opinions, however, were per curiam and do not indicate to what extent, if any, these circuit courts had in view the differences between the Walsh-Healey Act and the Fair Labor Standards Act. The Eighth Circuit in *Walling* v. *Benson, supra*, stated that this Court's opinion in the *Endicott Johnson* case was confined solely to an interpretation of the Walsh-Healey Act. The Tenth Circuit in the present case distinguished the two acts and held that the *Endicott Johnson* case was not "authority for the contention of the Administrator to the effect that the courts are deprived of the power of discretion in the performance of the judicial function committed to them" by the Fair Labor Standards Act. The Sixth Circuit in *Walling* v. *LaBelle Steamship Co., supra*, has adopted this interpretation of the case. The Third Circuit, in *Walling* v.

News Printing Co., supra, held the *Endicott Johnson* case was "persuasive" in determining the issues before it, but Judge McLaughlin, in his dissent, held that the opinion in that case was confined solely to an interpretation of the Walsh-Healey Act.

A final determination of this question is necessary in order to secure a uniform administration of the Act and to preserve the rights guaranteed by the Fourth Amendment. This Court should grant certiorari in the present case and resolve the conflict now existing between the Circuit Courts of Appeals on this question.

POINT 2

The refusal of the Circuit Court of Appeals, in the light of the record before it, to pass upon the merits of the case was arbitrary and capricious and should be reviewed by this Court.

The record in this case shows that the cause was tried in the District Court upon admissions and upon uncontradicted affidavits and that all the facts necessary for a decision on the merits were before the court. The District Court in its finding of fact No. 6 (R. 55) said:

> "The affidavits of the Respective parties are hereby made a part of the findings of fact by reference. It has been the purpose of the court to include in this statement the essential facts for decision herein. If any fact contained in the affidavits has been omitted it is hereby incorporated herein by reference and made a part hereof."

The District Court passed upon the question of coverage and held that petitioner was subject to the Act and therefore must comply with the demands of the subpoena.

On appeal, the question of coverage was presented to the Circuit Court in the briefs of both petitioner and respondent and on oral argument. Although the Circuit Court was urged to decide the question of coverage, it refused to pass

on this question and stated that "It is time enough to consider that question when all the evidence sought to be produced by the subpoena is before the court in a proceeding directly involving violations based on coverage" (R. 71).

As petitioner has pointed out, the Circuit Court's refusal to pass upon the question of coverage may subject a citizen to repeated inspections by the Administrator even though his business is not subject to the Act. If upheld, the court's decision to try the issue of coverage only in a "proceeding directly involving violations" will force a citizen harassed by inspectors to violate the law deliberately in order to have the question of coverage determined. In the event that the Administrator ignored a single or infrequent deliberate violation the citizen would have to adopt deliberately a course of repeated violations to obtain access to a forum in which his rights could be determined. Surely Congress never intended that a citizen would have to violate the law deliberately in order to secure for himself the rights guaranteed by the Federal Constitution.

In the light of the record before it, the refusal of the Circuit Court to pass upon the question of coverage and its decision to subject the petitioner to further and needless litigation was arbitrary and capricious and should be reviewed by this Court.

POINT 3

The holding of the Circuit Court of Appeals that the application of the Act to the newspaper publishing business does not violate the constitutional guaranty of a free press is in conflict with the decisions of this Court in Murdock v. Pennsylvania, supra, and other cases.

The Circuit Court of Appeals stated that the publisher of a newspaper has no special immunity from the application of general laws, including the Fair Labor Standards Act, and that the uniform regulations imposed by the Act are not an abridgment of freedom of the press. This statement

is in direct conflict with the holding of this Court in *Murdock* v. *Pennsylvania, supra,* that even a general law applying to all persons alike if it lays a direct burden on the business of the press must be nullified as to the press by reason on the prohibition against restraint contained in the First Amendment.

This Act lays a direct burden on the press. The business of preparing and publishing a daily newspaper is peculiar in that it demands a high degree of flexibility in operation (R. 29-30). If a publisher is limited in his operations by the application of the burdens of this Act, he will be unable to serve his readers adequately.

Newspapers which are unable to operate successfully under this Act will be forced to restrict circulation. Petitioner here sought to remove itself from the possible application of this law by eliminating its out of state subscribers. If it is held that the Act can now be applied to petitioner, petitioner will be compelled to discontinue its practice of sending free copies to Muskogee residents who are now serving in their country's armed forces. Restriction of circulation violates the guaranty of the First Amendment. *Lovell* v. *Griffin,* 303 U. S. 444 (1938); *Schneider* v. *State,* 308 U. S. 147 (1939); *Near* v. *Minnesota,* 283 U. S. 697 (1931); and *Grosjean* v. *American Press Co.,* 297 U. S. 233 (1936).

Furthermore, the court below overlooked the fact that an analysis of Section 13 (a) (8) shows that Congress classified the press for the purposes of regulation provided in this Act on the basis of volume of circulation, frequency of issue and area of distribution. Thus, the Act regulates the press by classifying it. If Congress has the power to classify the press as it has done here, it can exercise that power so as to benefit or burden any particular portion of the press it so desires. The First Amendment prohibits the exercise of this power by Congress.

The holding of the Circuit Court of Appeals in is conflict with decisions of this Court under the First Amendment and should be reviewed by this Court.

IV

Conclusion

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Constitutional Provisions Involved

The constitutional provisions involved are Article I, Section 8 of the Constitution of the United States and the First, Fourth and Fifth Amendments to the Constitution of the United States.

Article I, Section 8 of the Constitution of the United States provides that:

"The Congress shall have Power * * * To regulate Commerce * * * among the several States * * *."

The First Amendment to the Constitution of the United States provides that:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourth Amendment to the Constitution of the United States provides that:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution of the United States provides that:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case

to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statutory Provisions Involved

The statutory provisions involved are those embraced in the Fair Labor Standards Act of 1938 (52 Stat. 1060; 29 U. S. C., Sec. 201 *et seq.*) and in Sections 9 and 10 of the Federal Trade Commission Act (38 Stat. 722; 15 U. S. C., Sec. 41 *et seq.*)

A copy of the Fair Labor Standards Act is bound in as a part of this Appendix beginning at page 23.

Sections 9 and 10 of the Federal Trade Commission Act provide that:

"Sec. 9. For the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

"Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the

commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

"Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of the Act or any order of the commission made in pursuance thereof.

"The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

"Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

"No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided*, That no natural person so testifying shall be

exempt from prosecution and punishment for perjury committed in so testifying.

"Sec. 10. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

"Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to this Act, or who shall willfully neglect or fail to make, or cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

"If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the

Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

"Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court."

[PUBLIC—NO. 718—75TH CONGRESS]
[CHAPTER 676—3D SESSION]
[S. 2475]

AN ACT

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938".

FINDING AND DECLARATION OF POLICY

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

DEFINITIONS

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying,

the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying that such person is above the oppressive child-labor age. The Chief of the Children's Bureau shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Chief of the Children's Bureau determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodg-

ing, or other facilities are customarily furnished by such employer to his employees.

ADMINISTRATOR

SEC. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $10,000 a year.

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

(d) The Administrator shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable.

INDUSTRY COMMITTEES

SEC. 5. (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce.

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee,

and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

(e) No industry committee appointed under subsection (a) of this section shall have any power to recommend the minimum rate or rates of wages to be paid under section 6 to any employees in Puerto Rico or in the Virgin Islands. Notwithstanding any other provision of this Act, the Administrator may appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to all employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce, or the Administrator may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages to be paid, and in determining classifications, such industry committees and the Administrator shall be subject to the provisions of section 8 and no such committee shall recommend, nor shall the Administrator approve, a minimum wage rate which will give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands.

No wage orders issued by the Administrator pursuant to the recommendations of an industry committee made prior to the enactment of this joint resolution pursuant to section 8 of the Fair Labor Standards Act of 1938 shall after such enactment be applicable with respect to any employees engaged in commerce or in the production of goods for commerce in Puerto Rico or the Virgin Islands.[1]

MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8,

(5) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers.[1]

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

(c) The provisions of paragraphs (1), (2), and (3) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and insofar as such employee is covered by a wage order issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 5 (e).[1]

MAXIMUM HOURS

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

WAGE ORDERS

SEC. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from

time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Administrator a report containing its recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section; otherwise he shall disapprove such

recommendations. If the Administrator disapproves such recommendations, he shall again refer the matter to such committee, or to another industry committee for such industry (which he may appoint for such purpose), for further consideration and recommendations.

(e) No order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry.

(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance.

(g) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons.

ATTENDANCE OF WITNESSES

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

COURT REVIEW

SEC. 10. (a) Any person aggrieved by an order of the Administrator issued under section 8 may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon the Administrator, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the

petitioner. The review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be conclusive, and shall also file his recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect.

INVESTIGATIONS, INSPECTIONS, AND RECORDS

SEC. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Chief of the Children's Bureau may, for the purpose of carrying out their respective functions and duties under this Act, utilize

the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

CHILD LABOR PROVISIONS

SEC. 12. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) The Chief of the Children's Bureau in the Department of Labor, or any of his authorized representatives, shall make all investigations and inspections under section 11 (a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this Act relating to oppressive child labor.

EXEMPTIONS

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or

byproducts thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or (11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations.[1]

(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

(c) The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture while not legally required to attend school, or to any child employed as an actor in motion pictures or theatrical productions.

LEARNERS, APPRENTICES, AND HANDICAPPED WORKERS

SEC. 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates.

PROHIBITED ACTS

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any

[1] Amendment provided by Act of August 9, 1939 (Public No. 344, 76th Congress, 53 Stat. 1266).

goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11 (c), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a) (1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

PENALTIES

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The count in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

INJUNCTION PROCEEDINGS

SEC. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

RELATION TO OTHER LAWS

SEC. 18. No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

SEPARABILITY OF PROVISIONS

SEC. 19. If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Approved, June 25, 1938.

[PUBLIC LAW 283—77TH CONGRESS]

[CHAPTER 461—1ST SESSION]

[S. 1713]

AN ACT

To amend Public Law Numbered 718, Seventy-fifth Congress, approved June 25, 1938.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That paragraph (2) of subsection (b) of section 7 of Public Law Numbered 718, Seventy-fifth Congress, approved June 25, 1938, is hereby amended to read as follows:

"(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand and eighty hours during any period of fifty-two consecutive weeks, or".

Approved, October 29, 1941.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 61

OKLAHOMA PRESS PUBLISHING COMPANY,
Petitioner,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER, OKLAHOMA PRESS PUBLISHING COMPANY

ELISHA HANSON,
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Washington 5, D. C.;
JOSEPH C. STONE,
CHARLES A. MOON,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 61

OKLAHOMA PRESS PUBLISHING COMPANY,
Petitioner,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER, OKLAHOMA PRESS PUBLISHING COMPANY

OPINIONS BELOW

The opinion of the District Court (R. 53-56) is as yet unreported. The opinion of the Circuit Court of Appeals (R. 63-71) is reported in 147 F. 2d 658.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 15, 1945 (R. 71). Petition for a writ of certiorari was filed on April 16, 1945, and certiorari was granted on May 21, 1945.

The jurisdiction of this Court is based on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. C. Sec. 347 (a)).

QUESTIONS PRESENTED

1. Whether in a proceeding instituted for the purpose of compelling compliance with the commands of a subpoena duces tecum, the respondent therein in response to an order to show cause is barred from making the defense that it is not subject to the Act involved.

2. Whether petitioner is engaged in commerce or in the production of goods for commerce within the meaning of the Act.

3. Whether Congress, in the light of the prohibition of the First Amendment against the abridgment of the freedom of the press by any form of restraint whatsoever, has the power to apply the Act to the newspaper publishing business of petitioner.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are Article I, Section 8, Clause 3 of the Constitution of the United States and the First, Fourth and Fifth Amendments to the Constitution of the United States. These provisions are set forth in the Appendix at page 23.

The statutory provisions involved are those embraced in the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29

U. S. C. Sec. 201 *et seq.*) and Sections 9 and 10 of the Federal Trade Commission Act (38 Stat. 717, 722-723, 15 U. S. C. Secs. 49 and 50). These provisions are set forth in the Appendix at page 24.

STATEMENT

Petitioner is engaged at Muskogee, Oklahoma, in the business of publishing two daily newspapers—the Muskogee Daily Phoenix which is published each morning and the Muskogee Times-Democrat which is published each evening except Sunday (R. 54). The total net paid circulation of the Muskogee Daily Phoenix as of September, 1943, was 12,172 (R. 44, 54). The total net paid circulation of the Muskogee Times-Democrat as of the same date was 9,491. Since June 1, 1939, no papers have been sold by petitioner outside the State of Oklahoma (R. 44, 54). Petitioner mails daily, without charge, to Muskogee residents now in the armed forces approximately 17 copies of the Muskogee Times-Democrat and 120 copies of the Muskogee Daily Phoenix (R. 20, 42, 45-46, 54). Petitioner also mails, without charge, approximately 67 copies to its out of state representative for advertisers (R. 20, 42-43, 46, 54-55).

On June 3 and 4, 1943, one Erle P. Bryan, representing himself to be a duly authorized representative of the Administrator of the Wage and Hour Division, appeared at petitioner's office and sought to make an inspection of petitioner's books and records. Petitioner refused to permit any such search (R. 10, 20-21).

On November 3, 1943, a duplicate original of a paper purporting to be a subpoena duces tecum signed by L. Metcalfe Walling, Administrator of the Wage and Hour Division, requiring petitioner to appear before officers of the Wage and Hour Division on November 17, 1943, to produce certain requested material was served upon one Franklin E. Katterjohn (R. 7, 21). Said Katterjohn was not and never

has been a stockholder, director or officer of petitioner and has no control over the books, records and documents described in said purported subpoena duces tecum (R. 21-22). No one representing petitioner answered the purported subpoena duces tecum (R. 13-14).

L. Metcalfe Walling then made application to the District Court for the Eastern District of Oklahoma on January 29, 1944, for an order enforcing the aforesaid subpoena duces tecum (R. 5-9).

Upon an ex parte showing the District Court issued an order directing petitioner to show cause on February 18, 1944, why an order should not issue requiring it to comply with the aforesaid subpoena (R. 14-15). Time for filing an answer was extended to March 9, 1944.

In its return to the order to show cause and answer to the petition of the Administrator for enforcement of the purported subpoena petitioner denied essential jurisdictional facts, namely, that the Act is applicable to the business of petitioner; that the Administrator has jurisdiction over petitioner's affairs; and that the court had jurisdiction in the premises (R. 16-17). Petitioner also asserted as defenses that the attempted application of the Act to its business violated its rights as guaranteed by the First, Fourth and Fifth Amendments to the Constitution of the United States (R. 16-17).

The case was heard on March 9, 1944, by Judge Eugene Rice (R. 49-50).

Evidence in support of petitioner's defenses that it is not subject to the Act was received by the District Court and neither challenged nor denied by respondent herein. In fact the Administrator admitted the facts as to petitioner's operations and the District Court so found (R. 54). After consideration of all the evidence, the District Court held petitioner was subject to the Act and that the rule to show

cause was properly issued. On June 12, 1944, it entered an order requiring petitioner to give the Administrator access to the books and records prayed for in the subpoena (R. 56-57).

Petitioner appealed to the United States Circuit Court of Appeals for the Tenth Circuit. Argument on appeal was heard on November 15, 1944, in Wichita, Kansas. On February 15, 1945, the Circuit Court affirmed the judgment of the District Court.

The Circuit Court, in its decision, by-passed the undisputed facts in the record pertaining to coverage. It held that the Administrator upon an allegation based on information and belief only is empowered to make an investigation such as he sought herein and that "It is time enough to consider that question (coverage) when all the evidence sought to be produced by the subpoena is before the court in a proceeding directly involving violations based on coverage." (R. 71.)

Petitioner filed a petition for a writ of certiorari with this Court on April 16, 1945, and certiorari was granted on May 21, 1945.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the Administrator is entitled to an order enforcing an investigatory subpoena without a judicial adjudication that the industry sought to be investigated is subject to the Act.

2. In refusing, in the light of the record before it, to pass upon the merits of the case.

3. In holding that the application of the Act to the newspaper publishing business did not violate the constitutional guaranty of a free press and in overlooking the fact that the Act attempts to classify and thus to regulate the press

in violation of the guaranties of the First and Fifth Amendments.

4. In affirming the order of the District Court.

SUMMARY OF ARGUMENT

Point 1. The decision of the Circuit Court to permit the Administrator to search petitioner's books and records without a judicial determination that petitioner is subject to the Act and to determine the question of coverage only in a proceeding directly involving violations of the Act violates petitioner's rights as guaranteed by the Fourth Amendment. This decision cannot be justified on the ground of administrative expediency for all of the facts necessary to a determination of coverage were before the Circuit Court and its postponement of that determination did not actually speed administration of the Act. This decision, if upheld, will permit the Administrator to continue his wholesale investigations of all businesses without regard for the fact that the business investigated is not subject to the Act. A citizen not covered by the Act may be continually harassed by these unauthorized inspections and yet be unable to free himself if he is barred from raising the issue as to the right to inspect. No lawful purpose can be served by these unauthorized inspections and so petitioner should be permitted to bar this illegal entry at the threshold.

Point 2. Petitioner is not subject to the Act for it is not engaged in commerce or in the production of goods for commerce within the meaning of the Act. There is a definite "break" or termination of the interstate movement of the materials which petitioner receives from out of state. These materials are processed by independent acts of a local nature into an entirely new product before they are passed on to petitioner's readers. The business of pre-

paring a local newspaper is a strictly local business and thus not within the coverage of the Act. The mailing of a few complimentary copies out of state does not bring petitioner within the purview of the Act. The Act was designed to put a stop to nation-wide competition in goods produced under substandard labor conditions and petitioner is in no sense engaged in interstate competition with other newspapers. Furthermore, this out of state circulation which is not paid for is so small it falls within the *de minimis* doctrine.

Point 3. The Circuit Court erred in holding that the application of the Act to petitioner did not constitute a violation of the freedom of the press. Under this Court's decision in *Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943), this Act must be nullified as to the press because it lays a direct burden on the press. First, its application to the newspaper publishing business may make it financially impossible for a publisher to serve his readers adequately because of the burdens imposed if his staff is kept on the flexible schedule necessary to complete news coverage. Secondly, a publisher unable to operate successfully under the Act may find it necessary to withdraw himself from its coverage by eliminating his out of state subscribers. Furthermore, this Act does not treat all newspapers alike but classifies them for the purpose of regulation. This Court has held that classification of newspapers for the purpose of regulation violates the First Amendment. *Grosjean* v. *American Press Co.,* 297 U. S. 233 (1936).

Point 4. Under the terms of the Act, many of petitioner's competitors in the vicinity of Muskogee are exempt from the burdens of the Act. Petitioner is engaged in exactly the same business as these competitors. The application of the terms of the Act to petitioner while its competitors are exempted constitutes an unreasonable, arbitrary and

injurious discrimination in violation of its rights as guaranteed by the First and Fifth Amendments and is in conflict with the principles announced by this Court in *Grosjean v. American Press Co., supra.*

ARGUMENT

Point 1

The Circuit Court erred in holding that the Administrator is entitled to an order enforcing an investigatory subpoena without a judicial adjudication that the industry sought to be investigated is subject to the Act.

Section 11 (a) of the Act authorizes the Administrator to make investigations "in any industry subject to this Act" and Section 11 (c) requires that "every employer subject to any provisions of this Act" shall make and keep certain records. The Administrator, purporting to act under authority conferred by this statute, issued an alleged subpoena duces tecum in an attempt to inspect petitioner's books and records without making any formal determination or showing that petitioner's business is an "industry subject to this Act" or that petitioner is an "employer subject to any provisions of this Act" (R. 33).

Petitioner refused to obey the alleged subpoena duces tecum on the ground that since neither it nor its employees were subject to the Act the Administrator was without authority to inspect its books and records. In its return and answer to the order to show cause in the District Court petitioner denied: that the Act is applicable to the business of petitioner; that the Administrator has jurisdiction over petitioner's affairs; and that the District Court had jurisdiction in the premises. It also alleged that the attempted application of the Act to its business violates its rights as guaranteed by the First, Fourth and Fifth Amendments to the Constitution of the United States (R. 16-17). Peti-

tioner contended that these denials and allegations tendered issues of fact and law which the District Court was under a duty to determine at the outset of the proceedings. The District Court received evidence in support of all of petitioner's defenses, which were neither challenged nor denied by the Administrator. Furthermore, the District Court found that there is no dispute as to the facts and that the Administrator admitted for the purpose of the hearing that the petitioner conducts its business as set forth in the affidavits attached to its return to the order to show cause and its answer (R. 54). The District Court then held that petitioner was subject to the Act and ordered it to comply with the subpoena.

On appeal to the Circuit Court, petitioner again contended that it was the duty of the court to pass upon the question of coverage before ordering compliance with the subpoena. Petitioner argued that a hearing on an order to show cause is only an empty form if at that time the respondent is not permitted to make any defense as to compliance with the Act or as to coverage.

The Circuit Court in its decision by-passed this question of coverage, stating "It is time enough to consider that question when all the evidence sought to be produced by the subpoena is before the court in a proceeding directly involving violations based on coverage." (R. 71.) It held, on authority of *Walling* v. *Benson*, 137 F. 2d 501 (C. C. A. 8th, 1943), that petitioner was not entitled to an adjudication of actual coverage and that it was only necessary that the District Court have assurance "reasonable grounds exist for making the investigation." The Circuit Court further held that the Administrator's assertions on information and belief that petitioner is subject to the Act constitute a sufficient showing of "reasonable grounds."

This decision is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *General Tobacco*

& Grocery Co. v. *Fleming*, 125 F. 2d 596 (1942). In that case which arose under the same provisions of the Act as the controversy herein, the court held that where the answer of the respondent tenders an issue of fact on the jurisdictional question of interstate commerce the Administrator must show that the respondent is engaged in interstate commerce or in the production of goods for commerce. The court said:

> "* * * It is unreasonable to assume that Congress intended that one who, when called upon to produce his books and records, denies that he is engaged in transactions within the purview of the Act should be refused a hearing upon that issue before his privacy is invaded in derogation of his individual immunity from unreasonable search of his papers and effects." (125 F. 2d at p. 599.)

Since under the terms of the Act, the Administrator is only authorized to inspect industries subject to the Act, no lawful purpose could be served by permitting him to inspect industries not actually subject to the Act. The court, therefore, should determine the question of coverage at the outset of the proceeding. It is axiomatic that the time to stop the trespasser is at the threshold.

The more recent decision of the Sixth Circuit Court in *Walling* v. *LaBelle Steamship Co.*, 148 F. 2d 198 (1945), in no sense overrules its prior decision in the *General Tobacco Co.* case. In the *LaBelle Steamship Co.* case respondent, admittedly engaged in interstate commerce, resisted an attempted investigation by the Administrator on the ground that its employees were exempt from the Act as seamen. The court, in holding that respondent was not entitled to have the issue of coverage of its individual employees tried in this proceeding, distinguished the case from the *General Tobacco Co.* case in which the employer denied that it was

engaged in commerce or in the production of goods for commerce. Cases such as the *General Tobacco Co.* case and the present proceeding in which petitioner denied that it was engaged in commerce or in the production of goods for commerce and that it was subject to the Act are clearly distinguishable from cases in which part of a business is subject to the Act and only certain employees are exempt from its provisions.

The holding of the Circuit Court cannot be justified on the basis of administrative expediency, for all of the facts necessary for a decision on the merits were before the court. The District Court in its finding of fact No. 6 (R. 55) said:

> "The affidavits of the Respective parties are hereby made a part of the findings of fact by reference. It has been the purpose of the court to include in this statement the essential facts for decision herein. If any fact contained in the affidavits has been omitted it is hereby incorporated herein by reference and made a part hereof."

The Circuit Court should have decided the issue of coverage. The facts on this issue were complete in the record, where they still stand unchallenged and undenied. The Circuit Court's refusal to pass upon coverage, if upheld by this Court, has created a situation under which the Administrator may continue to ignore the commands of the statute and persist in flaunting the oft expressed policy of Congress condemning his attempted wholesale investigation of every person engaged in business in the United States.

Unless this decision be reversed, no person, even though specifically exempted by the precise terms of the Act or wholly outside its scope, can successfully resist a demand for investigation at any time it is made. If a citizen refuses admission to his inspectors, all the Administrator

need do under this decision is to allege upon information and belief—and without any facts whatsoever to support the allegation—that the person sought to be investigated is subject to the Act and the court ipso facto must grant his application for enforcement of the subpoena.

The citizen in answer to an order to show cause may show, as did petitioner herein, that he is neither engaged in commerce nor in producing goods for commerce. He may show he is exempt by the precise terms of Section 13. But, in either event, under this decision, he cannot drive the trespasser from his threshold and bar him from illegal entry.

The Administrator's intention to inspect everyone doing business as a routine matter of enforcement is undenied (R. 33-37).

Congress has condemned this procedure (R. 37-38).

Notwithstanding this condemnation by Congress, the Administrator has persisted in his course (R. 38). [Also, see record in *News Printing Co., Inc.* v. *Walling*, No. 63 this term, where the District Court found the investigation was initiated in the absence of complaint or charge of violation of law and solely as a matter of routine in hope something would turn up.]

If upheld, the Circuit Court's decision to try the issue of coverage only in a "proceeding directly involving violations" will force a citizen harassed by inspectors to violate the law deliberately in order to have the question of coverage determined. In the event that the Administrator ignored a single or infrequent deliberate violation the citizen would have to adopt deliberately a course of repeated violations to obtain access to a forum in which his rights could be determined. Surely Congress never intended that a citizen would have to violate the law deliberately in order to secure for himself the rights guaranteed by the Federal

Constitution. A citizen not subject to the Act cannot violate its terms and may never be able to free himself from the demands of investigators if he is barred from raising the issue as to their right to inspect.

The Circuit Court's decision must be condemned because it sacrificed petitioner's rights for administrative expediency. It must also be condemned because, as a practical matter, it will not speed administration of the Act. The only forum in which the question of coverage under the Fair Labor Standards Act can be determined is the court. Since the facts necessary to a determination of that question were before the court below, there was no justification for its decision to postpone that determination and to subject petitioner to an unwarranted invasion of the rights guaranteed it by the Fourth Amendment.

POINT 2

The record in the present case does not furnish reasonable grounds to believe petitioner is within the Act but, on the contrary, establishes that petitioner is not engaged in commerce or in the production of goods for commerce.

If the Circuit Court of Appeals had considered the merits of the case as presented in the record, it would have found that petitioner is not engaged in commerce or in the production of goods for commerce within the meaning of the Act.

The fact that petitioner receives news, feature articles and materials from out of state does not bring petitioner within the coverage of the Act. This Court, in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564 (1943), at page 571, stated that "* * * we cannot conclude that all phases of a wholesale business selling intrastate are covered by the Act solely because it makes its purchases interstate." And, in the companion case, *Higgins* v. *Carr Brothers Co.*, 317 U. S. 572 (1943), the Court held the Act inapplicable to a business

which imported materials from out of state where the goods came to rest within the state and there was no actual or practical continuity of movement of materials from without the state to customers within the state.

In the present case there is a definite "break" or termination of the interstate movement of materials which petitioner receives from out of state. Petitioner receives its out of state news on an automatic teletype machine which requires no one to operate it (R. 23, 47-48, 55). Portions of this news are then selected, edited and published in petitioner's newspapers (R. 23-24, 48). The supplies which come to petitioner from out of state are processed by independent acts of a purely local nature into an entirely new article which petitioner then sells to its readers.

The fact that a newspaper publisher does not merely pass on to his readers the materials which he has received but sells them an entirely new article was recognized by the United States Court of Appeals for the Fourth Circuit in *Schroepfer* v. *A. S. Abell Co.*, 138 F. 2d 111 (1943) (certiorari denied, January 17, 1944; rehearing denied, May 22, 1944), when it stated:

> "* * * there can be no question but that the interstate movement of materials used in the publication of papers, including news reports and other matter published, ended when they were delivered to defendant. Defendant used them as it saw fit in producing its papers and did not pass them on to its customers, as a telegraph company or a news service might have done. What occurred, therefore, was not mere 'milling in transit' but the production of an entirely new article of commerce in which the news received interstate was merely one of the ingredients." (138 F. 2d at p. 114.)

The New York Supreme Court, Appellate Division, in its decision in *Mabee* v. *White Plains Publishing Company, Inc.*, 267 App. Div. 284, 45 N. Y. S. 2d 479 (1943), which was unanimously affirmed by the Court of Appeals, 293 N. Y. 781

(1944), followed the *Schroepfer* decision and rejected the contention that the receipt of materials from out of state for use in the production of a newspaper brought the newspaper within the coverage of the Act.

This Court has held that the business of preparing, printing and publishing a newspaper is peculiarly local and distinct from its circulation, whether or not that circulation crosses state lines. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938). See also *Blumenstock* v. *Curtis Publishing Co.*, 252 U. S. 436 (1920).

As the court pointed out in *Mabee* v. *White Plains Publishing Company, Inc.*, *supra*, the business of publishing a local newspaper is a "strictly local as distinguished from a national activity" and is not covered by the Act. Petitioner here is engaged in a local activity. Its newspapers are designed primarily to serve the residents of Muskogee and vicinity. Thus, it falls within the category of local business which Congress left to the protection of the states. *Walling* v. *Jacksonville Paper Co., supra.* And, as this Court recently pointed out in *10 East 40th Street Building, Inc.* v. *Charles Callus et al.*, 89 L. ed. 1244 (1945) (advance opinions), courts must be alert "not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation."

The mailing, without charge, of a small per cent of its total circulation to residents of Muskogee in the armed forces and to its out of state advertising representative does not change petitioner's business from an intrastate business to an interstate one within the purview of the Act.[1]

The congressional hearings on the Fair Labor Standards Act plainly indicate that the purpose of this Act was to pro-

[1] The Administrator has ruled that small weeklies do not lose their exemptions under Section 13 (a) (8) of the Act because of their willingness to send either paid or free subscriptions to members of the armed forces. See Point 4, infra, for a discussion of this policy.

tect and foster interstate commerce by the suppression of competition by goods produced under low wage conditions with those produced by employees working under adequate standards. And, this Court in *United States* v. *Darby*, 312 U. S. 100 (1941), stated that the Act was designed to eliminate "the spread of substandard labor conditions through the use of the facilities of interstate commerce *for competition* by the goods so produced with those produced under the prescribed or better labor conditions * * *." (312 U. S. at p. 122.) (Emphasis supplied.) In mailing complimentary copies out of state to residents of Muskogee serving our Nation, petitioner is in no sense competing interstate with other newspapers and it is not engaged in commerce or in producing goods for commerce within the meaning and purpose of the Act.

In any event, if the mailing of these complimentary copies should be held to place petitioner in commerce then this case would fall within the *de minimis* doctrine.

This Court in *N. L. R. B.* v. *Fainblatt*, 306 U. S. 601 (1939), recognized that there were cases arising under the National Labor Relations Act in which the courts would apply the *de minimis* doctrine. Since, as the Court pointed out in *A. B. Kirschbaum Co.* v. *Walling*, 316 U. S. 517 (1942), and *Walling* v. *Jacksonville Paper Co., supra*, the Fair Labor Standards Act is not as broad in its scope as the National Labor Relations Act, it is clear that there are cases arising under the Fair Labor Standards Act in which the courts should apply the doctrine of *de minimis*.

In a number of cases arising under the Act, the courts have applied this doctrine by holding that where the interstate business of the employer constitutes only a small portion of the total business and where it is not an integral part of the service rendered the Act does not apply. *Goldberg* v. *Worman*, 37 F. Supp. 778 (S. D. Florida, March 18, 1941); *Rauhoff* v. *Henry Gramling & Co.*, 42 F. Supp. 754 (E. D.

Arkansas, August 22, 1941); *Zehring* v. *Brown Materials*, 48 F. Supp. 740 (S. D. California, January 19, 1943); *Cron* v. *Goodyear Tire & Rubber Co.*, 49 F. Supp. 1013 (M. D. Tennessee, April 28, 1943); *Sapp et al.* v. *Horton's Laundry*, 56 F. Supp. 901 (N. D. Georgia, January 18, 1944); *Mabee* v. *White Plains Publishing Company, Inc., supra.*

Since the record before it showed petitioner is not engaged in commerce or in the production of goods for commerce within the Act, the Circuit Court of Appeals erred in holding the Administrator had reasonable grounds to believe that petitioner was subject to the Act. Its refusal to pass upon the merits of petitioner's defenses was arbitrary and capricious.

POINT 3

The Circuit Court erred in holding that the application of the Act to petitioner did not constitute an abridgment of the constitutional guaranty of the freedom of the press.

The holding of the Circuit Court of Appeals that the provisions of the Act can be applied to petitioner's newspaper publishing business is, in effect, a holding that Congress in the exercise of its regulatory powers derived from Article I, Section 8, Clause 3 of the Constitution can nullify the prohibitions against restraints of the press embraced in the First Amendment to the Constitution.

The Act here in controversy is not a general law affecting all persons alike. Section 13 of the Act exempts many types of employees from the so-called "benefits" of the Act. Furthermore, it exempts numerous entire businesses and industries from the burdens of the Act. Still further, as originally enacted, only one business in the entire range of business and industry was classified in the Act for the purpose of regulation.

That business was the newspaper publishing business.

Under the provisions of Section 13 (a) (8) all weekly and semi-weekly newspapers with a circulation of less than

3,000, the major part of which circulation is within the county where printed and published, are exempted from the minimum wage and overtime provisions of Sections 6 and 7 of the Act. All other newspapers whether weekly, semi-weekly, tri-weekly, daily, Sunday or daily and Sunday are subjected to the burdens of Sections 6 and 7 of the Act.

A study conducted by the Wage and Hour Division shows that of a total of 13,476 newspapers published in 1938, daily, daily and Sunday, weekly, semi-weekly and tri-weekly, 10,379, or 77 per cent of the total, had circulations under 3,000, while 11,496, or 85 per cent of the total, had circulations under 5,000. In the weekly, semi-weekly, and tri-weekly fields 9,775 or 91 per cent of the total in these fields, had circulations under 3,000. In the daily field 521, or 25 per cent of all dailies, had circulations under 3,000 and in the Sunday field 101, or 17 per cent of all Sundays, had circulations under 3,000.

In the group between 3,000 and 5,000 circulation, 489 were weeklies and 467 dailies.

In the group between 5,000 and 10,000 circulation, 233 were weeklies, semi-weeklies and tri-weeklies and 455 dailies. Only 654 dailies and 218 weeklies, semi-weeklies and tri-weeklies had over 10,000 circulation. Practically all of 9,755 weekly and semi-weekly newspapers have less than 3,000 circulation. These, constituting 72 per cent of all newspapers published in the United States and 91 per cent of all weekly and semi-weekly newspapers published in the United States, are exempted from the burdens of the Act (Small Daily Newspapers Under Fair Labor Standards Act, Wage and Hour Economics Division, June, 1942).

Analysis of the provisions of Section 13 (a) (8) shows that Congress classified the press for the purposes of the regulation provided in this Act on the basis of volume of circulation, frequency of issue and area of distribution.

The Circuit Court erred in holding that a newspaper has no special immunity from the application of general laws. This Court has held, in *Murdock* v. *Pennsylvania, supra,* that even a general law applying to all persons alike if it lays a direct burden on the business of the press must be nullified as to the press by reason of the prohibition against restraint contained in the First Amendment.

This Act lays a direct burden on the press. The business of preparing and printing a daily newspaper is peculiar in that it demands a high degree of flexibility in operation (R. 29-30). If a publisher is limited in his operations by the application of the burdens of this Act, he will be unable to serve his readers adequately.

Newspapers which are unable to operate successfully under this Act will be forced to restrict circulation. Petitioner here sought to remove itself from the possible application of this law by eliminating its out of state subscribers. If it is held that the Act can now be applied to petitioner, petitioner will be compelled to discontinue its practice of sending free copies to Muskogee residents who are now serving in their country's armed forces. This will deprive these persons of a service to which they are entitled under the provisions of the First Amendment which was written not to guarantee a special privilege to persons engaged in a particular type of business but to guarantee to the citizens of this country the right to have information of vital public importance free from government control or restraint. This Court has held that such restriction of circulation violates the guaranty of the First Amendment. *Lovell* v. *Griffin,* 303 U. S. 444 (1938); *Schneider* v. *State,* 308 U. S. 147 (1939); *Near* v. *Minnesota,* 283 U. S. 697 (1931); and *Grosjean* v. *American Press Co., supra.*

Furthermore, the court below overlooked the fact that the Act regulates the press by classifying it. If Congress has

the power to classify the press as it has done here it can exercise that power so as to benefit or burden any portion of the press it so desires. This is obvious from the very nature of the factors used by Congress for its classification.

The use of one of these factors, the only one used in fact by the State Legislature of Louisiana, was condemned by this Court in *Grosjean* v. *American Press Co., supra.*

The notorious Huey Long legislature when it sought to penalize those newspapers in Louisiana which were opposed to the Long regime enacted a tax law aimed at silencing the anti-Long press. The legislature classified the press of Louisiana on the single basis of volume of circulation, levying the tax on all newspapers with a circulation in excess of 20,000 per week and exempting all newspapers in Louisiana with a circulation less than 20,000 per week.

In this Act Congress has not only applied volume of circulation as used by the Louisiana legislature as one of its factors for classifying the press but has added two more, namely, frequency of issue and the area in which a newspaper is distributed. The very use of these factors serves to restrict circulation and deprive the people of their rights to information which our forefathers guaranteed them under the First Amendment.

That Amendment prohibits any such exercise of the power here asserted by Congress.

Point 4

Application of Sections 6 and 7 to petitioner's business would constitute an unreasonable, arbitrary and injurious discrimination against petitioner in violation of its rights as guaranteed by the First and Fifth Amendments to the Constitution.

As has been pointed out hereinbefore Section 13 (a) (8) of the Act classifies the press on the basis of volume of cir-

culation, frequency of issue and area of distribution in such a way as to exempt from the burdens of Sections 6 and 7 more than 72 per cent of all newspapers published in the United States.

Among the newspapers freed from those burdens are many weekly newspapers published in the vicinity of Muskogee (R. 43, 46). The business of these weekly newspapers is exactly the same as that of petitioner (R. 27). The Administrator of the Wage and Hour Division has stated that he will not consider that any of these small newspapers will lose its exemption merely because of its willingness to supply the hometown paper either free or by paid subscription to members of the armed forces and that limits in circulation contained in Section 13 (a) (8) are to be exclusive of such subscriptions. (See F. L. S. A. Status of Small Newspapers, 6 Wage and Hour Reporter 730.)

Therefore, it follows that the application of Sections 6 and 7 to petitioner whose out of state circulation consists only of free subscriptions to members of the armed forces would constitute an unreasonable, arbitrary and injurious discrimination in violation of its rights as guaranteed by the First and Fifth Amendments to the Constitution and in conflict with the principles announced by this Court in *Grosjean* v. *American Press Co., supra.*

CONCLUSION

It is respectfully submitted that on the record and the authorities cited the Administrator was without authority to inspect petitioner's books and records and the Circuit Court's holding that he may make such an inspection was a flagrant violation of petitioner's rights as guaranteed by the Constitution. This Court should reverse the Circuit

Court and grant such other and further relief as to the Court may seem proper.

Respectfully submitted,

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APPENDIX

Constitutional Provisions Involved

The constitutional provisions involved are Article I, Section 8 of the Constitution of the United States and the First, Fourth and Fifth Amendments to the Constitution of the United States.

Article I, Section 8 of the Constitution of the United States provides that:

"The Congress shall have Power * * * To regulate Commerce * * * among the several States * * *."

The First Amendment to the Constitution of the United States provides that:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourth Amendment to the Constitution of the United States provides that:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution of the United States provides that:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case

to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statutory Provisions Involved

The statutory provisions involved are those embraced in the Fair Labor Standards Act of 1938 (52 Stat. 1060; 29 U. S. C., Sec. 201 *et seq.*) and in Sections 9 and 10 of the Federal Trade Commission Act (38 Stat. 722-723; 15 U.S.C., Secs. 49 and 50).

A copy of the Fair Labor Standards Act is bound in as a part of this Appendix beginning at page 29.

Sections 9 and 10 of the Federal Trade Commission Act provide that:

"Sec. 9. For the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

"Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the

commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

"Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of the Act or any order of the commission made in pursuance thereof.

"The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

"Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

"No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided*, That no natural person so testify-

ing shall be exempt from prosecution and punishment for perjury committed in so testifying.

"Sec. 10. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

"Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to this Act, or who shall willfully neglect or fail to make, or cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

"If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the

Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

"Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court."

[PUBLIC—No. 718—75TH CONGRESS]

[CHAPTER 676—3D SESSION]

[S. 2475]

AN ACT

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938".

FINDING AND DECLARATION OF POLICY

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

DEFINITIONS

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying,

the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying that such person is above the oppressive child-labor age. The Chief of the Children's Bureau shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Chief of the Children's Bureau determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodg-

ing, or other facilities are customarily furnished by such employer to his employees.

ADMINISTRATOR

SEC. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $10,000 a year.

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

(d) The Administrator shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable.

INDUSTRY COMMITTEES

SEC. 5. (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce.

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee,

and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

(e) No industry committee appointed under subsection (a) of this section shall have any power to recommend the minimum rate or rates of wages to be paid under section 6 to any employees in Puerto Rico or in the Virgin Islands. Notwithstanding any other provision of this Act, the Administrator may appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to all employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce, or the Administrator may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages tobe paid, and in determining classifications, such industry committees and the Administrator shall be subject to the provisions of section 8 and no such committee shall recommend, nor shall the Administrator approve, a minimum wage rate which will give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands.

No wage orders issued by the Administrator pursuant to the recommendations of an industry committee made prior to the enactment of this joint resolution pursuant to section 8 of the Fair Labor Standards Act of 1938 shall after such enactment be applicable with respect to any employees engaged in commerce or in the production of goods for commerce in Puerto Rico or the Virgin Islands.[1]

MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8,

(5) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers.[1]

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

(c) The provisions of paragraphs (1), (2), and (3) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and insofar as such employee is covered by a wage order issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 5 (c).[1]

MAXIMUM HOURS

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

WAGE ORDERS

SEC. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from

time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Administrator a report containing its recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section; otherwise he shall disapprove such

recommendations. If the Administrator disapproves such recommendations, he shall again refer the matter to such committee, or to another industry committee for such industry (which he may appoint for such purpose), for further consideration and recommendations.

(e) No order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry.

(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance.

(g) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons.

ATTENDANCE OF WITNESSES

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

COURT REVIEW

SEC. 10. (a) Any person aggrieved by an order of the Administrator issued under section 8 may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon the Administrator, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the

petitioner. The review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be conclusive, and shall also file his recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect.

INVESTIGATIONS, INSPECTIONS, AND RECORDS

SEC. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Chief of the Children's Bureau may, for the purpose of carrying out their respective functions and duties under this Act, utilize

the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

CHILD LABOR PROVISIONS

SEC. 12. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) The Chief of the Children's Bureau in the Department of Labor, or any of his authorized representatives, shall make all investigations and inspections under section 11 (a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this Act relating to oppressive child labor.

EXEMPTIONS

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or

byproducts thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or (11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations.[1]

(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

(c) The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture while not legally required to attend school, or to any child employed as an actor in motion pictures or theatrical productions.

LEARNERS, APPRENTICES, AND HANDICAPPED WORKERS

SEC. 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates.

PROHIBITED ACTS

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any

[1] Amendment provided by Act of August 9, 1939 (Public No. 344, 76th Congress, 53 Stat. 1268).

goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11 (c), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a) (1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

PENALTIES

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The count in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

INJUNCTION PROCEEDINGS

SEC. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

RELATION TO OTHER LAWS

SEC. 18. No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

SEPARABILITY OF PROVISIONS

SEC. 19. If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Approved, June 25, 1938.

[PUBLIC LAW 283—77TH CONGRESS]

[CHAPTER 461—1ST SESSION]

[S. 1713]

AN ACT

To amend Public Law Numbered 718, Seventy-fifth Congress, approved June 25, 1938.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That paragraph (2) of subsection (b) of section 7 of Public Law Numbered 718, Seventy-fifth Congress, approved June 25, 1938, is hereby amended to read as follows:

"(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand and eighty hours during any period of fifty-two consecutive weeks, or".

Approved, October 29, 1941.

FILED
MAY 5 1945
CHARLES ELMORE CROPLEY
CLERK

No. 1171

In the Supreme Court of the United States

OCTOBER TERM, 1944

OKLAHOMA PRESS PUBLISHING COMPANY,
PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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OPINIONS BELOW

The findings of fact and conclusions of law of the district court (R. 53–56) are not officially reported. The opinion of the circuit court of appeals (R. 63–71) is reported in 147 F. 2d 658.

JURISDICTION

The judgment of the circuit court of appeals was entered on February 15, 1945 (R. 71). The

petition for a writ of certiorari was filed on April 16, 1945. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether the district court had power to order compliance with a subpoena duces tecum issued by the Administrator of the Wage and Hour Division, without a prior trial and adjudication of the issue whether petitioner is subject to the Fair Labor Standards Act.

2. Whether enforcement of the subpoena would violate the freedom of press guaranteed by the First Amendment to the Constitution.

STATUTES INVOLVED

The statutory provisions involved are Sections 9 and 11 (a) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201, and Section 9 of the Federal Trade Commission Act, 38 Stat. 717, 15 U. S. C. 49. These provisions are set forth in the Appendix.

STATEMENT

Upon the refusal of petitioner to permit any inspection of its records by the Wage and Hour Division, a subpoena duces tecum signed by the Administrator of the Division was duly served on the business manager of petitioner's two newspapers, on November 3, 1943, requiring petitioner to appear before a designated representative of the Division at a specified place in Muskogee,

Oklahoma, on November 17, 1943, to produce certain specified records and papers in a matter "involving an investigation pursuant to the provisions of Sections 9 and 11 (a) of the Fair Labor Standards Act of 1938 regarding complaints of violations by said company * * *" (R. 9–12, Exs. B and C). The records called for were petitioner's wage and hour records for employees of its two newspapers during a particular period and the "books, papers and documents showing the distribution of papers outside the State of Oklahoma, the dissemination of news outside the State of Oklahoma, the source and receipt of news from outside the State of Oklahoma, and the source and receipt of advertisements of nationally advertised goods" (R. 11).

Petitioner refused to comply with the subpoena on the ground that it believed the Act to be inapplicable to its business (R. 12–14). The Administrator thereupon applied to the district court for an order directing compliance with the subpoena. The application (R. 5–9) alleged, on information and belief, that petitioner publishes two daily newspapers and is engaged in the production of goods for interstate commerce and in commerce within the meaning of the Act, and that all the books, papers and documents referred to in the subpoena were relevant and material "to determine whether the company has violated [the Act] * * * and will aid in the enforcement of the provisions of the Act" (R. 8).

In response to an order to show cause why the subpoena should not be enforced (R. 14–15), petitioner admitted that it publishes two daily newspapers, that it receives out-of-State news and advertisements which it prints in its newspapers, and that 137 papers are sent daily to members of the armed forces serving in other states and overseas and 67 daily to out-of-State advertisers (R. 19, 54–55, Deft. Exs. C, D, E, F, R. 41–49). Petitioner challenged the jurisdiction of the court and contended, as summarized by the district court (R. 53–54), "that the Act is not applicable to newspapers, and if so, it is unconstitutional; that the Company is not engaged in commerce or in the production of goods for commerce within the meaning of the Act; and that its employees are not engaged in commerce or in the production of goods for commerce."

The district court granted the Administrator's application and issued an order requiring the production of the records specified in the subpoena (R. 56–57). On the authority of *Sun Publishing Co.* v. *Walling,* 140 F. 2d 445 (C. C. A. 6), certiorari denied, 322 U. S. 728, the court ruled that petitioner's business was subject to the Act. It concluded that it had jurisdiction of the proceedings "under the provisions of the Act, and under the facts admitted herein" and that no reason had been shown for withholding a compliance order (R. 55–56).

The circuit court of appeals affirmed (R. 63–71). It held that petitioner "is not entitled to an adjudication of actual coverage as a prerequisite to the enforcement of the subpoena" (R. 69). Relying upon the decision in the Eighth Circuit in *Walling* v. *Benson,* 137 F. 2d 501, certiorari denied, 320 U. S. 791, the court stated that the Administrator must show "probable cause" or "that reasonable grounds exist for making the investigation" (*ibid.*), but that "to hold that the Administrator cannot compel the production of data relating to coverage until that question has been conclusively determined, is to deny him the very powers deemed necessary in order to effectuate the purposes of the Act" (R. 70). The application and the accompanying affidavits in the instant case were held to furnish a sufficient showing of "reasonable grounds." Petitioner's further contention that the enforcement of the subpoena would violate the First Amendment was rejected on the ground that newspaper publishers are not immune from the application of general laws, and that the regulations "imposed upon those covered by the Fair Labor Standards Act are not an abridgment of the freedom of the press" (R. 71).

ARGUMENT

The main issue in this case is the same as the issues presented in three cases in which this Court has denied certiorari: *Standard Dredging Corp.* v. *Walling,* 319 U. S. 761; *Mississippi Road Sup-*

ply Co. v. *Walling*, 320 U. S. 752; *Benson* v. *Walling*, 320 U. S. 791. In each case the petition was opposed by the Government on the ground that this Court's decision in *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, should be regarded as controlling and as having resolved any conflict between the decisions of the court below and that of the Circuit Court of Appeals for the Sixth Circuit in *General Tobacco & Grocery Co.* v. *Fleming*, 125 F. 2d 596. In the interval since this Court's denial of certiorari in the above cases, the circuit courts of appeals for the Tenth Circuit (in the instant case), the Third Circuit (*Walling* v. *News Printing Co.*, No. 1179, this Term, pending on petition for writ of certiorari), and apparently even the Sixth Circuit (*Walling* v. *LaBelle Steamship Co.*, 8 Wage Hour Rept. 353),[1] have joined the other circuits in ruling that the Administrator is entitled to judicial enforcement of a subpoena without a prior hearing or determination of the issue whether the employer is subject

[1] While the *LaBelle* decision does not expressly overrule the *General Tobacco* decision, it clearly abandons the position that a hearing and determination of coverage is a prerequisite to enforcement of a subpoena. The *LaBelle* opinion states that the Administrator "is entitled to the desired order without the necessity of an actual showing that the employer proceeded against is clearly within the provisions of the Act" where he has "reasonable grounds" to believe the employer is covered or that the latter has information essential to the investigation. 8 Wage Hour Rept. at 354.

to the Fair Labor Standards Act.[2] Although the courts in some circuits have stated that there should be a showing of "reasonable grounds" for investigation while others have not required any such showing, and although the courts have expressed various views regarding the extent of the applicability of the *Endicott Johnson* decision to the Fair Labor Standards Act, all of the circuit courts of appeals are now in agreement that enforcement of the Administrator's subpoenas is not dependent upon a prior trial and determination of the issue of coverage. Contrary to petitioner's assertion, therefore (see Pet. 5, 10–11), there is plainly no conflict among the circuits on the issue presented on this record.

There is no more reason for granting the petition for certiorari in this case than there was in the *Standard Dredging, Mississippi Road Supply,* and *Benson* cases, *supra.* There is even less occasion for granting the petition here than there

[2] *Martin Typewriter Co.* v. *Walling*, 135 F. 2d 918 (C. C. A. 1); *Walling* v. *Standard Dredging Corp.*, 132 F. 2d 322 (C. C. A. 2); *Mississippi Road Supply Co.* v. *Walling*, 136 F. 2d 391 (C. C. A. 5); *Fleming* v. *Montgomery Ward & Co.*, 114 F. 2d 384 (C. C. A. 7), certiorari denied, 311 U. S. 690; *Walling* v. *Benson*, 137 F. 2d 501 (C. C. A. 8), certiorari denied, 320 U. S. 791; *Cudahy Packing Co.* v. *Fleming*, 122 F. 2d 1005 (C. C. A. 8), reversed, 315 U. S. 785, on the ground that the subpoena in that case was not issued by the Administrator; *Cudahy Packing Co. of Louisiana* v. *Fleming*, 119 F. 2d 209 (C. C. A. 5); reversed on the same ground, 315 U. S. 357.

was in a case like the *Standard Dredging* case, because here the court adopted and applied the view that the Administrator must make a showing of "reasonable grounds" for making the investigation—a requirement which was not imposed by the *Standard Dredging* decision. *In re Standard Dredging Corp.*, 44 F. Supp. 601, 602, affirmed 132 F. 2d 322 (C. C. A. 2), certiorari denied, 319 U. S. 761; see also *Martin Typewriter Co.* v. *Walling*, 135 F. 2d 918 (C. C. A. 1).

Petitioner, in its status as a newspaper publisher, further challenges the decision below on the ground that the enforcement of the subpoena will constitute an abridgment of the freedom of press guaranteed by the First Amendment (Pet. 6, 14–15). But, as the circuit court of appeals pointed out (R. 71): " 'The publisher of a newspaper has no special immunity from the application of general laws,' *Associated Press* v. *Labor Board*, 301 U. S. 103, including the Fair Labor Standards Act." In *Sun Pub. Co.* v. *Walling*, 140 F. 2d 445, in which this Court denied a petition for certiorari (322 U. S. 728), the identical contention that the application of the Act to a newspaper violates its constitutional rights was rejected by the circuit court of appeals for the Sixth Circuit. Every circuit court of appeals and district court which has considered the question has taken the same view.[3]

[3] In addition to the decision below, see *Walling* v. *News Printing Co.*, 8 Wage Hour Rept. 270 (C. C. A. 3), No. 1179

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

HUGH B. COX,
Acting Solicitor General.

DOUGLAS B. MAGGS,
Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,

FLORA G. CHUDSON,
Attorney,
United States Department of Labor.

MAY 1945.

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this Term, pending on petition for a writ of certiorari; *Fleming* v. *Lowell Sun Co.*, 36 F. Supp. 320 (D. Mass.), reversed on other grounds, 120 F. 2d 213 (C. C. A. 1), affirmed per curiam, 315 U. S. 784; *Walling* v. *Evening Post Publ. Co.*, 8 Wage Hour Rept. 431 (E. D. S. C.). The district court in the instant case made a similar ruling, and in the *News Printing* case, although the district court refused an enforcement order on the ground that coverage had not been proved, it held that there was no merit in the constitutional objections raised by the respondent newspaper.

APPENDIX

Fair Labor Standards Act, c. 676, 52 Stat. 1060 (29 U. S. C. 201 et seq.):

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

* * * * *

SEC. 11 (a). The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all

the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

Federal Trade Commission Act, 38 Stat. 717 (15 U. S. C. 49):

SEC. 9.

* * * * * * * * *

* * * in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

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Nos. 61, 63

In the Supreme Court of the United States

OCTOBER TERM, 1945

OKLAHOMA PRESS PUBLISHING COMPANY,
PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

NEWS PRINTING COMPANY, INC., PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 61

OKLAHOMA PRESS PUBLISHING COMPANY, PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 63

NEWS PRINTING COMPANY, INC., PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

NO. 61

The findings of fact and conclusions of law of the District Court for the Eastern District of

Oklahoma (R. 53–56) are printed at 7 Wage Hour Rept. 665. The opinion of the Circuit Court of Appeals for the Tenth Circuit (R. 63–71), affirming the judgment of the District Court, is reported at 147 F. 2d 658.

NO. 63

The opinion of the District Court for the District of New Jersey (R. 22–28) is reported at 49 F. Supp. 659. The majority and dissenting opinions of the Circuit Court of Appeals for the Third Circuit (R. 89–98), reversing the judgment of the District Court, are reported at 148 F. 2d 57.

JURISDICTION

The judgment of the Circuit Court of Appeals in No. 61 was entered on February 15, 1945 (R. 71). The petition for a writ of certiorari was filed on April 16, 1945, and granted on May 21, 1945. The judgment of the Circuit Court of Appeals in No. 63 was entered on March 5, 1945 (R. 98). The petition for a writ of certiorari was filed on April 19, 1945, and granted on May 21, 1945. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether trial and adjudication of the applicability of the provisions of the Fair Labor Standards Act to an employer is a prerequisite to enforcement of an administrative subpoena duces

tecum issued in the course of an investigation under Section 11 (a) of that Act.

2. Whether in a proceeding to enforce such a subpoena against a member of an industry which is generally within the scope of the Act, the Administrator must show "probable cause" to believe that the employees of the particular member are covered by the Act.

3. Whether enforcement of the administrative subpoenas issued in the course of investigations to ascertain whether petitioners have violated any provisions of the Act infringes the Fourth Amendment.

4. Whether the application of the Act to newspaper publishers abridges the guaranties of the First Amendment.

STATUTES INVOLVED

The statutory provisions involved are Sections 9, 11 (a), and 13 (a) (8) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201–219, and Section 9 of the Federal Trade Commission Act, 38 Stat. 717, 15 U. S. C. 49. These provisions are set forth in the Appendix.

STATEMENT

NO. 61

Upon the refusal of petitioner to permit any inspection of its records by the Wage and Hour Division, a subpoena duces tecum signed by the

Administrator was duly served on the business manager of petitioner's two newspapers on November 3, 1943, requiring petitioner to appear before a designated representative of the Division at a specified place in Muskogee, Oklahoma, on November 17, 1943, to produce certain specified records and papers in a matter "involving an investigation pursuant to the provisions of Sections 9 and 11 (c) [(a)] of the Fair Labor Standards Act of 1938 regarding complaints of violations by said company * * * " (R. 9–12, Exs. B and C). The records called for were petitioner's wage and hour records for employees of its two daily newspapers during a specified period and the "books, papers and documents showing the distribution of papers outside the State of Oklahoma, the dissemination of news outside the State of Oklahoma, the source and receipt of news from outside the State of Oklahoma, and the source and receipt of advertisements of nationally advertised goods". (R. 11).

Petitioner refused to comply with the subpoena on the ground that the Act was inapplicable to its business (R. 12–14). The Administrator thereupon applied to the District Court for an order directing compliance with the subpoena. The application (R. 5–9) alleged, on information and belief, that petitioner publishes two daily newspapers and is engaged in the production of goods for interstate commerce and in commerce

within the meaning of the Act, and that all the books, papers and documents referred to in the subpoena are relevant and material "to determine whether the company has violated [the Act] * * * and will aid in the enforcement of the provisions of the Act" (R. 8).

In response to an order to show cause why the subpoena should not be enforced (R. 14–15), petitioner admitted that it publishes two daily newspapers, that it receives out-of-State news and advertisements which it prints in its newspapers, and that 137 papers are sent daily without charge to members of the armed forces serving in other States and overseas and 67 daily to out-of-State advertisers (R. 19, 54–55, Dft. Exs. C, D, E, F, R. 41–49). Petitioner challenged the jurisdiction of the court and contended, in the words of the District Court (R. 53–54), "that the Act is not applicable to newspapers, and if so, it is unconstitutional; that the Company is not engaged in commerce or in the production of goods for commerce."

The District Court granted the Administrator's application and issued an order requiring the production of the records specified in the subpoena (R. 56–57). On the authority of *Sun Publishing Co.* v. *Walling,* 140 F. 2d 445 (C. C. A. 6), certiorari denied 322 U. S. 728, the court ruled that petitioner's business was subject to the Act. It concluded that it had jurisdiction of the proceed-

ings "under the provisions of the Act, and under the facts admitted herein" and that no reason had been shown for withholding a compliance order (R. 55–56).

The Circuit Court of Appeals affirmed (R. 63–71). It held that petitioner "is not entitled to an adjudication of actual coverage as a prerequisite to the enforcement of the subpoena" (R. 69). The court stated that the Administrator must show "probable cause" or "that reasonable grounds exist for making the investigation" (*ibid*), but that "to hold that the Administrator cannot compel the production of data relating to coverage until that question has been conclusively determined, is to deny him the very powers deemed necessary in order to effectuate the purposes of the Act" (R. 70). The application and affidavits in the instant case were held to furnish a sufficient showing of "reasonable grounds for the belief that appellant [petitioner] or any of its employees were subject to the Act" (R. 70). Petitioner's further contention that the enforcement of the subpoena would violate the First Amendment was rejected on the grounds that newspaper publishers are not immune from the application of general laws and that the regulations "imposed upon those covered by the Fair Labor Standards Act are not an abridgment of the freedom of the press" (R. 71).

NO. 63

This was a proceeding instituted by the Administrator to enforce a subpoena substantially the same as that involved in *Oklahoma Press Publishing Company* v. *Walling,* No. 61. He alleged that he had "reasonable grounds for believing that . . . [petitioner] was violating" stated provisions of the Act (R. 4). In its response to the order to show cause, which was similar to that in No. 61, petitioner raised various constitutional objections, denied that it was subject to the Act, and denied that the District Court had jurisdiction. Petitioner alleged that its net paid daily circulation was 27,470 and that an average of only 278 of its newspapers were distributed daily outside the State of New Jersey. (R. 11–21.)

The District Court denied the Administrator's application on the ground that he was not entitled to enforcement of the subpoena without establishing in the enforcement proceeding that the employer is subject to the Act (R. 22–28). It held, however, that there was no merit in petitioner's contention that the application of the Act to newspapers constitutes an abridgment of freedom of the press or violates the Fifth Amendment (R. 27).

The Circuit Court of Appeals, one judge dissenting, reversed the judgment denying the application (R. 89–98). It held that the Administra-

tor's application was sufficient to entitle him to judicial enforcement of the subpoena (R. 94), pointing out that "to require the Administrator to make proof of coverage would be to turn the proceeding into a suit to decide a question which must be determined by the Administrator in the course of his investigation" (R. 95). Petitioner's constitutional objections were rejected (R. 96).

Judge McLaughlin dissented on the ground that there was not a sufficient showing of "probable cause" or "reasonable ground for believing that petitioner's business is subject to the Act" to warrant judicial enforcement of the subpoena (R. 96–98).

SUMMARY OF ARGUMENT

I

Section 11 (a) of the Fair Labor Standards Act authorizes the Administrator to make investigations and to issue subpoenas in connection therewith "to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of the Act." Hence it is necessary for the Administrator to investigate facts showing whether a particular employer is subject to its provisions as well as whether he has failed to make the wage and hour payments required by the Act. It would be anomalous and impracticable to require proof of the fact of coverage in advance of inspection,

and the Act makes no such requirement. The decisions below holding that the district courts should not try and adjudicate the question of coverage before enforcing a subpoena are in harmony with the statute, with the overwhelming majority of decisions of the lower courts, and with applicable principles laid down by this Court.

The Act entrusts to the Administrator the duty of determining by investigation whether violations have occured before seeking the aid of the courts in enforcement proceedings. In such enforcement proceedings petitioners would be free to raise all questions going to the merits including the defense that they were not subject to the provisions of the Act. Nothing in the language or scheme of the Act suggests that a judicial determination of coverage is a prerequisite to the investigation; it was plainly intended that the investigation be a means of ascertaining whether the Act applies and whether underpayments have been made, before judicial enforcement proceedings are instituted.

Considerations which caused this Court in *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, to decide that the district court should not try the issue of coverage in a proceeding to enforce an administrative subpoena under the Public Contracts Act apply to the enforcement of subpoenas under the Fair Labor Standards Act.

Under both statutes the duty to make investigations is entrusted to the administrative agency which must investigate coverage as well as the wages and hours of employees. To sever the issues for separate court hearing and decision would be of the same "doubtful practicality" under the Fair Labor Standards Act as under the Public Contracts Act.

It is not our contention that the function of the district courts in enforcing a subpoena under Section 9 of the Act is ministerial or that "appropriate defense" may not be made to an application for enforcement. The application may properly be resisted if the subpoena is vague or unreasonably burdensome or if the evidence sought is not germane to any lawful subject of inquiry. There is ample scope in the auxiliary judicial proceeding for protection against arbitrary use of the subpoena power, but no authority to require the trial and adjudication of the question whether the employer addressed in a subpoena is subject to the Act as a prerequisite to enforcement of the subpoena.

II

Although there was ample showing of "probable cause" with respect to coverage before the District Courts in the cases at bar, no showing of probable cause is necessary to secure the enforcement of a subpoena if the evidence called for is not plainly irrelevant to any lawful inquiry under

the Act. The same considerations that make it unnecessary to prove coverage in these auxiliary proceedings make it improper to require the Administrator to establish probable cause with respect to coverage before he may have the aid of the courts in his investigations. The purpose of investigation by the Administrator being to ascertain whether violations have occurred, he should not be called upon as a condition to making such an investigation to present evidence forecasting a probable favorable result.

The showing of probable cause is not necessary to avoid judicial sanction for unwarranted or arbitrary action. The same tests applicable to the enforcement of grand jury subpoenas, pretrial examinations, and other auxiliary court proceedings should be applied, and if the evidence called for is not palpably irrelevant to any lawful inquiry or the subpoena is not issued in bad faith, no further showing should be required. Unless it appears from the pleadings and facts concerning the industry which are of common knowledge that employees within it could not be covered by the terms of the statute, investigation to ascertain whether violations have occured is not arbitrary or unwarranted. In cases where coverage is doubtful, an investigation may be especially necessary to resolve the doubt.

The present cases, however, are not doubtful ones. The contention that trade in news among the States is not interstate commerce has been

definitely rejected by this Court. Nor is there any question that Congress intended the Fair Labor Standards Act to apply to newspapers. The very facts set forth in petitioners' papers filed in opposition to these applications show that their activities are subject to the terms of the Act.

III

The subpoenas here involved comply fully with the requirements of the Fourth Amendment. They have no oppressive features. Their demands are specific, limited in time, and call for records clearly relevant to the inquiry authorized by the statute. They have none of the evils of writs of assistance at which the Fourth Amendment was aimed.

There is no requirement in the statute or otherwise that there be formal complaints of violations either by or to the Administrator before an investigation may be undertaken. This Act unlike the Public Contracts Act does not provide for the issuance of a formal complaint by the Administrator prior to his inquiry. Neither did Congress provide that the Administrator must first be prodded by the complaint of an outsider before undertaking to ascertain whether violations of the Act have occurred.

IV

The application of the wage and hour standards of the Act to petitioners' newspaper employees

does not violate the constitutional guaranty of a free press. Newspapers are not exempt from the application of general laws and the First Amendment does not afford them immunity from observing minimum labor standards. The Fair Labor Standards Act does not impose any censorship or otherwise "trespass upon the domains set apart" for a free press.

The exemption of certain classes of weekly newspapers by Section 13 (a) (8) of the Act does not constitute an invalid classification. The Fifth Amendment does not require the full and uniform exercise of the commerce power, and Congress may weigh relative needs and limit the application of legislative measures.

ARGUMENT

I

TRIAL AND ADJUDICATION OF THE QUESTION WHETHER PETITIONERS WERE COVERED BY THE ACT WAS NOT PREREQUISITE TO ENFORCEMENT OF THE SUBPOENAS

Section 11 (a) of the Fair Labor Standards Act authorizes the Administrator to conduct investigations. Section 9 of the Act authorizes him for the purpose of such investigations to issue subpoenas which the district courts are empowered to enforce. Section 11 (a) authorizes two distinct types of investigatory proceedings: (1) investigations to "gather data regarding the wages, hours, and other conditions and practices of employment

in any industry subject to this Act * * *," without reference to enforcement, and (2) investigations for the purpose of law enforcement.

These cases involve the second type of investigations. With respect to these, the Administrator is authorized to

> enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate *to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act.*[1] [Italics supplied.]

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[1] The distinction between the two types of investigations which the Administrator is thus authorized to conduct is clearly set out in *In re Standard Dredging Corp.*, 44 F. Supp. 601 (S. D. N. Y.), affirmed, 132 F. 2d 322 (C. C. A. 2), certiorari denied, 319 U. S. 761, where the court said: "A logical line divides the two powers of investigation. The first power is apparently intended largely for statistical and informational purposes. Its object is knowledge, like that of much of the data gathered under the census, not law enforcement. * * * The second power is designed to facilitate the enforcement of a law which necessarily requires on [the] part of the government an intimate acquaintance with working conditions, wages and hours of employment in individual establishments. The power granted is as broad as the need. 'To determine whether any person has violated any provision of this Act' it is no more requisite to know what wages he pays and what hours he keeps than to know whether he is engaged in commerce" (p. 602).

An administrative determination "whether any person has violated any provision of this Act" is contemplated by Section 11 (a) and must necessarily be made before suit by the Administrator for an injunction against violations, such as is authorized by Section 17. This determination—and therefore the investigation preceding it—must relate to coverage as well as to underpayment[2] since both of these elements are equally necessary to a violation. The Administrator cannot be expected to know in advance of the investigation whether a particular employer has violated the Act or the extent to which, if at all, he is subject to the Act. Since one of the purposes of the investigation is to determine whether the business of the employer is covered by the Act, it would be anomalous and impracticable to require proof of this fact in advance of inspection, just as it would be to require advance proof of underpayments. It is our position that the Act does not require such proof.

It is not our contention that the function of the district courts in enforcing subpoenas under Section 9 of the Act is ministerial or that "the court ipso facto must grant his [the Administrator's]

[2] "Coverage" is used in this brief to mean the applicability of the provisions of the Fair Labor Standards Act to a group of employees, rendering their employer subject to the Act, and "underpayment" to mean failure to observe the minimum wage or overtime compensation requirements of the Act.

application for enforcement" (Pet. No. 61, br. 12). The statement that this is the Government's contention results from a misapprehension both of our position and of the decisions of the circuit courts of appeals in these cases. To an application for enforcement of a subpoena "appropriate defense" may of course be made. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 49. The application may properly be resisted on the ground that the subpoena is unduly vague or unreasonably burdensome, *Hale* v. *Henkel*, 201 U. S. 43; or that the hearing is not of the kind authorized, *Harriman* v. *Interstate Commerce Comm.*, 211 U. S. 407; or that the subpoena was not issued by the person solely vested with that power. *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357.[3] To these may be added the ground that on the pleadings it is plain that the evidence sought is not germane to any lawful subject of inquiry—as would be the case in these proceedings if, for example, a demand had been made for a list of the petitioners' stockholders or the dividends paid to them. In short under any view there is ample scope in the auxiliary judicial proceeding for pro-

[3] No question of the privilege against self-incrimination arises since Section 9 of the Federal Trade Commission Act (*infra*, pp. 47–48), which is made applicable to investigations under the Fair Labor Standards Act by Section 9 of that Act (*infra*, p. 46), provides immunity from criminal prosecution for persons testifying or producing documentary evidence in obedience to administrative subpoenas.

tection against arbitrary use of the subpoena power.

It is also clear that even if the petitioners' contentions were to prevail, they would not be protected from disclosure of the contents of the records called for by the subpoena until there had first been a judicial determination of coverage. For if, as petitioners urge, the district courts upon application to enforce the administrative subpoena are to try the question whether petitioners' employees are covered by provisions of the Act, the Administrator would, in those proceedings, be entitled to have the very same records produced as evidence pursuant to subpoenas issued by the courts. By appropriate discovery proceedings, the Administrator could also secure the production of these records before trial of the issue of coverage in any proceeding which he might bring either to enforce the subpoena or to enjoin violations. See *Bethlehem Shipbuilding Corp., Ltd.* v. *National Labor Relations Board,* 120 F. 2d 126 (C. C. A. 1).

The actual issue which emerges is a narrow one. It is whether an application for enforcement of a subpoena for employment records and records of the interstate activities of petitioners, the coverage of whose employees by the Act is one of the matters under investigation, shall be made the occasion for the courts to adjudicate that question

in an auxiliary and essentially interlocutory proceeding. The decisions below holding such adjudications to be improper are in harmony with the statute, with accepted principles laid down by this Court, and with the overwhelming majority of decisions of the lower courts.

Petitioners are not in these proceedings being accused of violating the Act. The questions of coverage which they seek to raise are matters that should not be tried and determined unless and until action is instituted by the Administrator to enforce the substantive provisions of the Act against them. Without evidence it cannot definitely be known whether or to what extent the Act applies or whether petitioners have complied with its provisions. The whole purpose of the investigations authorized by Section 11 (a) is to enable the Administrator to determine those questions in deciding whether or not to institute an action to enforce the provisions of the Act. This is his function and it is premature to ask a court in an auxiliary proceeding, brought to compel obedience to a subpoena, to decide questions which may never be at issue in an enforcement action.

Enforcement of the Act would be seriously impeded if in order to inspect an employer's records the Administrator had first to litigate all questions going to the merits which a respondent might choose to raise. Nothing in the language or scheme of the Act suggests that a judicial determination of coverage is a prerequisite to the

investigation; it is plainly intended, rather, that the investigation be a means of ascertaining whether the Act applies and whether underpayments have been made before judicial enforcement proceedings are instituted. To dispense with the preliminary investigation of coverage would compel the Administrator to institute enforcement proceedings on suspicion or unverified reports, a practice which would certainly be of "dubious propriety". *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, 508. To impose on the other hand the burden of proving coverage in order to carry forward the investigation would be to deprive the Administrator of the aid to enforcement which the investigatory provisions of the statute were designed to afford.

With one possible exception, all the circuit courts of appeals which have passed upon the question have held that the Administrator is not required to prove coverage in order to obtain court aid in the enforcement of subpoenas. *Martin Typewriter Co.* v. *Walling,* 135 F. 2d 918 (C. C. A. 1); *Walling* v. *Standard Dredging Corp.,* 132 F. 2d 322 (C. C. A. 2), certiorari denied, 319 U. S. 761; *Walling* v. *American Rolbal Corp.,* 135 F. 2d 1003 (C. C. A. 2); *Walling* v. *News Printing Co.,* 148 F. 2d 57 (C. C. A. 3), No. 63 herein; *Cudahy Packing Co. of La.* v. *Fleming,* 119 F. 2d 209 (C. C. A. 5), reversed on other grounds, 315 U. S. 785; *Mississippi Road Supply Co.* v. *Walling,* 136 F. 2d 391 (C. C. A. 5), certiorari denied, 320 U. S.

752; *Fleming* v. *Montgomery Ward & Co.*, 114 F. 2d 384 (C. C. A. 7), certiorari denied, 311 U. S. 690; *Walling* v. *Benson*, 137 F. 2d 501 (C. C. A. 8), certiorari denied, 320 U. S. 791; *Cudahy Packing Co.* v. *Fleming*, 122 F. 2d 1005 (C. C. A. 8), reversed on other grounds, 315 U. S. 785; *Oklahoma Press Pub. Co.* v. *Walling*, 147 F. 2d 658 (C. C. A. 10), No. 61 herein. The Circuit Court of Appeals for the Fourth Circuit has not passed on this question, but the district courts of that circuit are in accord. *Walling* v. *Daily Press*, 58 F. Supp. 792 (E. D. Va.); *Walling* v. *Evening Post Publ. Co.*, 8 Wage Hour Rept. 431 (E. D. S. C.). In the Ninth Circuit, the district court decision in *Fleming* v. *Bank of America National Trust & Savings Assn.*, 5 Wage Hour Rept. 242 (N. D. Calif.), is *contra*, but *Walling* v. *Detweiler Bros.*, 58 F. Supp. 201 (D. Idaho), is in accord with the majority view. In the Sixth Circuit, *General Tobacco & Grocery Co.* v. *Fleming*, 125 F. 2d 596, decided prior to the *Endicott Johnson* case, *supra*, held that coverage must be proved before enforcement of the Administrator's subpoena will be ordered, but this holding has since been modified in *Walling* v. *LaBelle Steamship Co.*, 148 F. 2d 198 (C. C. A. 6).

Considerations which caused this Court in *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, to decide that the District Court should not try the issue of coverage in a proceeding to enforce an

administrative subpoena under the Public Contracts Act apply to the enforcement of subpoenas under the Fair Labor Standards Act.[4] Although the Public Contracts Act and the Fair Labor Standards Act occupy different areas and provide somewhat different procedures,[5] their provisions

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[4] That case has been held controlling in proceedings to enforce subpoenas of the Administrator of the Wage and Hour Division by the First and Second Circuits and was regarded as at least persuasive by the Fifth Circuit. *Martin Typewriter Co.* v. *Walling*, 135 F. 2d 918 (C. C. A. 1); *Walling* v. *Standard Dredging Corp.*, 132 F. 2d 322 (C. C. A. 2); *Mississippi Road Supply Co.* v. *Walling*, 136 F. 2d 391 (C. C. A. 5), certiorari denied, 320 U. S. 752. The Circuit Court of Appeals for the Sixth Circuit has held it to be not controlling, although it reached the same result as if it were. *Walling* v. *LaBelle Steamship Co.*, 148 F. 2d 198 (C. C. A. 6); and cf. *Walling* v. *Benson*, 137 F. 2d 101 (C. C. A. 8).

Although the opinion in the *Endicott-Johnson* case does not discuss the applicability of the decision to subpoena enforcement proceedings under the Fair Labor Standards Act, this Court stated (317 U. S. at p. 502) that certiorari had been granted in part "because of probable conflict" of the decision of the Circuit Court of Appeals for the Second Circuit which it affirmed and the holding of the Sixth Circuit in *General Tobacco & Grocery Co.* v. *Fleming*, 125 F. 2d 596, which required proof of coverage before a Wage-Hour subpoena would be enforced.

[5] In the *Endicott Johnson* case this Court cited the formal proceedings before the Secretary, leading to decisions with regard to violations of the Public Contracts Act, and the conclusiveness of the Secretary's determinations of fact, including the fact of coverage, as among the reasons why the district courts should not undertake to decide coverage in interlocutory proceedings for the enforcement of subpoenas. Although the particular reasons for deference to the administrative authority are not present under the Fair Standards

are similar with respect to investigations. The Secretary of Labor under the former statute and the Administrator of the Wage and Hour Division under the latter are authorized to conduct investigations to ascertain whether or not violations of the law have occurred. In such inquiries the Administrator, like the Secretary of Labor under the Public Contracts Act, must investigate coverage as well as possible underpayments, both elements being "indispensable" to violations under both statutes. Under both Acts the investigation is entrusted to the administrative agency and not to the courts, whose function at that stage is to aid investigations by enforcing subpoenas properly issued.

The difference between the two statutory schemes is that the Secretary of Labor under the Public Contracts Act, following his investigation, makes a formal determination of coverage and imposes sanctions in the administrative proceed-

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Act, the more significant considerations underlying the *Endicott Johnson* decision, to which we refer, are present and point to the same conclusion under both Acts.

We do not understand the statement in the Court's opinion in that case that the Public Contracts Act is not "an Act of general applicability" but one which applies only to those who contract with the Government and who thereby are "fairly forewarned" of the terms (317 U. S. at p. 507), to mean that an employer by so contracting has waived any right to a prior determination of coverage in the proceedings to enforce a subpoena which he would otherwise have had by virtue of constitutional requirements.

ing, subject to customary court review[6] (41 U. S. C. 36–39), whereas the Administrator of the Wage and Hour Division as a result of his investigation determines only whether to institute court action seeking the imposition of sanctions. This is a difference in the scope of the ultimate administrative function; but under both acts the purpose of the subpoena is to aid the investigation entrusted to the administrative authority. Accordingly, the same considerations which make it improper for a district court to undertake the determination of coverage when called upon to enforce a subpoena issued in the course of an investigation pursuant to Section 5 of the Public Contracts Act make it equally improper in a similar proceeding under the Fair Labor Standards Act for a court to undertake the determination of coverage which the Administrator should make.

The need for investigating the question of coverage and the impracticability of severing the issue of coverage for "separate hearing and decision" are the same under both acts. The Administrator like the Secretary is unfamiliar with the

[6] The action of the Secretary under Section 3 of the Public Contracts Act in placing a violator on an ineligible list for three years has been held to be not judicially reviewable on the authority of *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113. *Lane Cotton Mills* v. *Perkins*, U. S. District Court for the District of Columbia, Civil Action No. 8433, decided October 15, 1940.

operation of individual plants prior to inspection, and any procedure which would require him to decide the issue of coverage without benefit of an investigation would, as in the case of the Public Contracts Act, be of "dubious propriety". To sever the issues for separate court hearing and decision would, as under that Act, be "of doubtful practicality". *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. at p. 508.

Indeed, as a practical matter the enforcement of a subpoena without prior judicial determination of coverage would appear to be less objectionable under the Fair Labor Standards Act than under the Public Contracts Act. The Administrator's investigations cannot result in sanctions until after the institution of suits for injunction or criminal actions in which all questions, including that of "coverage", are tried *de novo,* unaffected by any prior administrative determination. *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 523. The Secretary of Labor under the Public Contracts Act, on the other hand, is authorized to reach a final determination as to both coverage and compliance and can himself impose sanctions. Courts called upon to enforce the penalties which the Secretary imposes are concluded by his findings "if supported by the preponderance of the evidence" (41 U. S. C. 39). The opportunity of the employer to challenge the administrative conclusions which a court would anticipate by inter-

ference at the subpoena stage is, accordingly, much more limited under that Act than under the Fair Labor Standards Act.

We submit, therefore, that it was proper for the courts below to enforce the administrative subpoenas without prior trial of petitioners' claims that their respective businesses were not subject to the Act.

II

ALTHOUGH THERE WAS AMPLE SHOWING OF "PROBABLE CAUSE" BEFORE THE DISTRICT COURTS IN THE CASES AT BAR, NO SHOWING OF "PROBABLE CAUSE" IS NECESSARY IF THE EVIDENCE CALLED FOR IS NOT PLAINLY IRRELEVANT TO ANY LAWFUL INQUIRY UNDER THE ACT

The same considerations that render it unnecessary to prove coverage in these proceedings to enforce subpoenas make it improper to require the Administrator to establish "probable cause" to believe that petitioners are subject to the Act before he may have the aid of the courts in his investigation. Under Section 11 (a) it is the duty of the Administrator to investigate "whether any person has violated any provision" of the Act, and Section 9 authorizes him to invoke the assistance of the courts against those who prevent him from pursuing his investigations. There is no more reason why the Administrator should possess or produce evidence of coverage rising to the level of "probable cause" before being per-

mitted to proceed with an investigation than there is to require him to present full proof of coverage. The issue in these proceedings is not how probable it is that an employer may be subject to the Act or may have departed from its provisions but whether the investigation to ascertain whether there have been violations may proceed unimpeded by the employer's refusal to disclose information necessary for that purpose. The Administrator's function in ascertaining whether violations have occurred is not unlike that of a grand jury investigating to determine whether crimes have been committed. No prior showing of probable cause to believe that a crime has been committed need be made to justify a grand jury subpoena, *Blair* v. *United States*, 250 U. S. 273, 282–283; *Hale* v. *Henkel*, 201 U. S. 43, and nothing in the language or purpose of the Fair Labor Standards Act imposes any greater limitation upon the investigatory powers of the Administrator.

The decision of the court below in No. 63 did not require the Administrator to show probable cause with respect to coverage, and the Circuit Courts of Appeals for the First and Second Circuits are in agreement. *Martin Typewriter Co.* v. *Walling*, 135 F. 2d 918 (C. C. A. 1); *Walling* v. *Standard Dredging Corp.*, 132 F. 2d 322 (C. C. A. 2). See also *Mississippi Road Supply Co.* v. *Walling*, 136 F. 2d 391 (C. C. A. 5); *Walling*

v. *Detweiler Bros.*, 58 F. Supp. 201 (D. Idaho); *National Labor Relations Board* v. *Northern Trust Co.*, 148 F. 2d 24 (C. C. A. 7), certiorari denied October 8, 1945, Nos. 189–190, this Term; *Walling* v. *Daily Press*, 58 F. Supp. 792 (E. D. Va.). The Circuit Court of Appeals for the Tenth Circuit in No. 61 stated that the Administrator must show "probable cause"[7] to believe that the petitioner's activities are covered by the Act, as did Judge McLaughlin, dissenting in No. 63. The Circuit Court of Appeals for the Eighth Circuit (*Walling* v. *Benson*, 137 F. 2d 501) and for the Sixth Circuit (*Walling* v. *LaBelle Steamship Co.*, 148 F. 2d 198) apply the same rule.

It is submitted that the holdings of the courts first cited are correct. The Act does not contemplate that the Administrator must refrain from investigating to ascertain "whether any person has violated any provisions of the Act" when he does not in advance of his investigation possess and produce facts which it is the very purpose of the investigation to disclose. The holding of the court below in No. 61 that the Administrator must satisfy the District Court in the enforcement proceedings that there were "reasonable grounds for the belief that appellant [petitioner] or any of its employees were subject to the Act" (R. 70) rests not on any provision in the Act but upon

[7] The court held that probable cause had been shown in the instant case.

concern lest judicial sanction be given to unwarranted and arbitrary action (R. 69). The showing of probable coverage, however, is not essential to avoid arbitrary action in the investigatory proceeding. It is of course true that judicial responsibility in such auxiliary court proceedings requires assurance that no fundamental rights are being invaded by the subpoena, but this does not mean that the inquiry must be "limited * * * by * * * forecasts of the probable result of the investigation * * *," *Blair* v. *United States*, 250 U. S. 273, 282. We have already pointed out that when the court's aid is invoked under Section 9 appropriate defenses may be interposed, for example, to resist a subpoena which is unreasonably vague or unduly burdensome. So, too, it is not denied that the court must be free to refuse to enforce a subpoena which calls for evidence palpably irrelevant or one plainly issued in bad faith. This is the test consistently applied[8] in cases where an auxiliary court is asked to lend its aid to compel testimony or to procure evidence

[8] Similar criteria govern examinations, depositions and subpoenas before trial under the Federal Rules of Civil Procedure. See Rules 26 (b), 30 (d) and 45. For representative decisions under these Rules, see: *Union Central Life Ins. Co.* v. *Burger*, 27 F. Supp. 556 (S. D. N. Y.); *Bloomer* v. *Sirian Lamp Co.*, 8 F. R. S. 26b.31, Case 3 (D. Del.). Questions as to the ultimate admissibility upon the trial of the evidence sought are not permitted to "frustrate the attempt to obtain the desired information" in the pre-trial proceedings (*Lewis* v. *United Air Lines Transport Corp.*, 27 F. Supp. 946, 947 (D. Conn.)).

for use in connection with a grand jury investigation, *Blair* v. *United States,* 250 U. S. 273, 282–283; *Essgee Co.* v. *United States,* 262 U. S. 151, 157, or in aid of a hearing in another court, *Dowagiac Mfg. Co.* v. *Lochren,* 143 Fed. 211, 215 (C. C. A. 8), or in discovery proceedings in aid of an action at law, *Sinclair Refining Co.* v. *Jenkins Co.,* 289 U. S. 689.[9] The opinion of this Court in the *Endicott Johnson* case suggests that in proceedings to enforce administrative subpoenas the same test is applicable, i. e., whether "the evidence sought by the subpoena . . . [is] plainly incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties under the Act * * *" 317 U. S. at 509.[10]

The Fourth Amendment (Pet. br. No. 61, p. 23) does not require that all searches be preceded by proof of probable cause. By its language a show-

[9] Although Mr. Justice Cardozo, in the opinion of the Court, speaks of "good faith and probable cause", these requirements are said to be imposed to protect the litigant in the action at law from "impertinent intrusion" of his records by "a competitor posing as a suitor", 289 U. S. at pp. 696–697. This does not suggest that discovery will be denied unless the plaintiff shows probability of success in the main action.

[10] Since the opinion below in No. 61 does not indicate what would be an adequate showing of "probable cause", it may be that the rule enunciated is no different from the test we here contend for. On the other hand the court may mean that the Administrator must, before he may obtain the aid of a court in investigating an employer, present evidence gathered from other sources forecasting a probable favorable result of the investigation. It is the latter requirement which we contend is improper.

ing of "probable cause" is required only with respect to search warrants. The misuse of warrants was the evil at which the Amendment was primarily directed. In fact, there is evidence in the constitutional history of the Fourth Amendment that general warrants were the sole abuse sought to be prevented. See N. B. Lasson, *The History and Development of the Fourth Amendment* (1937), pp. 81, 100–103. In any event, the constitutional limitation upon other types of searches is that they be not unreasonable, and a showing of probable cause is not a necessary element of permissible searches, as the cases dealing with grand jury subpoenas show. Moreover, legislatures are well aware that probable cause is a prerequisite to the issuance of valid search warrants (see, e. g., the provisions of the Criminal Code relating to search warrants, 18 U. S. C., 611–633) and it is reasonable to assume that if Congress had intended a similar showing to be made by the Administrator before he could secure the aid of a court in enforcing a subpoena, it would have expressly so provided in Section 9 of the Act.

When called upon to aid in enforcing a subpoena the district courts should accordingly accept the Administrator's allegation that he has reasonable grounds for making the investigation unless the evidence called for is palpably irrelevant to any lawful inquiry. Like other public officers, the Administrator is entitled to the presumption of regularity in the performance of

his official duties, *United States* v. *Chemical Foundation,* 272 U. S. 1, 14; *Klamath Indians* v. *United States,* 296 U. S. 244, 253, and unless it appears from the pleadings and from facts concerning the industry which are common knowledge that employees within it could not be covered by the terms of the statute, an investigation to ascertain whether violations have occurred is not arbitrary or unwarranted. In the ordinary case in which an investigation is likely to be undertaken the Administrator cannot determine in advance, and neither can the courts, whether the inquiry will disclose facts which are irrelevant to any purpose authorized by the Act. For the courts to ascertain whether there is probable cause they would themselves ordinarily have to subpoena the employer's records in advance of reaching a determination. It would be unreasonable to require that the Administrator make his determination, required by the statute, without a similar opportunity to examine the primary sources of information. It is precisely for this purpose that the Act affords him the right to investigate and the power to issue subpoenas.

If the Administrator were to subpoena the records of a business of a kind plainly outside of the scope of the Act, such as that of the corner grocery store or the ordinary farmer, the court would of course not be bound to accept the allegation that there were reasonable grounds for an investi-

gation. The Administrator should in that event be called upon to make some additional showing to justify an investigation under Section 11 (a). In such cases it would appear upon the face of the pleadings that, absent some special circumstances, the records were palpably irrelevant to any inquiry to ascertain violations of the Act. But in other cases, even though coverage be doubtful, where the Administrator is satisfied that there is cause to investigate he should not be required to satisfy the court by prima facie proof of coverage of the particular employer. The very purpose of the investigation is to resolve doubts. To go further and require the Administrator to introduce evidence to "satisfy" the court that he has "probable cause" to believe that respondent is covered by the Act is to restrict unduly that cooperation between Administrator and courts upon which enforcement of the Act depends. It is precisely in those situations where coverage is not readily apparent and where the facts are most difficult to ascertain that the Administrator needs the aid of the courts in carrying out his investigation.

The present cases, however, are not doubtful ones and the pleadings and affadavits before the district courts plainly showed "probable cause" as to coverage. This Court "need not again pass upon the contention that trade in news carried on among the states is not interstate commerce" (*Associated Press* v. *United States,* Nos. 57, 58, 59,

October Term, 1944, slip opinion, p. 9), previously rejected in *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103. Nor is there any question that Congress intended the Fair Labor Standards Act to apply to newspapers. Section 13 (a) (8) specifically exempts certain classes of local weekly and semi-weekly papers of limited circulation.[11] Whether a particular newspaper or its employees fall within or without the scope of the Act is a question which can only be determined on the basis of the particular facts relating to them. Since the industry is unques-

[11] The Act has been held applicable to employees of newspapers in *Sun Publishing Co.* v. *Walling*, 140 F. 2d 445 (C. C. A. 6), certiorari denied, 322 U. S. 728; *Fleming* v. *A. H. Belo Corp.*, 36 F. Supp. 907 (N. D. Tex.), affirmed, 121 F. 2d 207, affirmed, 316 U. S. 624; *Fleming* v. *Lowell Sun Co.*, 36 F. Supp. 320 (D. Mass.), reversed on other grounds, 120 F. 2d 213 (C. C. A. 1), affirmed *per curiam*, 315 U. S. 784.

Petitioners' reliance on the decision of the Circuit Court of Appeals for the Fourth Circuit in *Schroepfer* v. *A. S. Abell Co.*, 138 F. 2d 111, is misplaced. That suit involved the coverage of newspaper rackmen whose only duties related to the delivery of papers to local distribution racks and who had nothing to do with collecting news, assembling and printing the paper, or any other activity in which interstate commerce was involved. Petitioners make no reference to the explicit recognition by the Fourth Circuit that some of the newspaper's employees were unquestionably engaged in interstate commerce and therefore subject to the Act. The first sentence of the court's opinion, immediately following its summary of the facts, reads as follows (p. 113):

> There is no question but that the defendant is engaged in interstate commerce with respect to the publication of its papers, the gathering of news therefor and the sale of the portion of its papers sent out of the state.

tionably one usually engaged in interstate commerce, nothing more need be shown even to establish "probable cause".

Furthermore, in the instant cases the nature of the industry and the normal presumption that the Administrator has reasonable grounds to believe coverage exists are buttressed by the facts appearing in the pleadings and affidavits. In the *Oklahoma Press* case, No. 61, the petitioner's contention that its newspaper publishing business is a wholly local activity to which the Act is inapplicable is defeated by its own admissions. Under the admitted facts, petitioner as publisher of two daily newspapers (R. 19) in Muskogee, Oklahoma, is in continuous receipt of out-of-State news and advertising material which it incorporates in its papers (R. 23–24), and regularly ships in interstate commerce a small number of newspapers (about 204 daily) to out-of-State readers and advertisers (R. 20, 54). The editorial staffs handle, select, edit, and write headlines for national and international press reports received by teletype machines located in the newspaper offices (R. 23–24). It is common knowledge that national and world news is made available to newspapers like those owned by petitioner through membership in interstate wire services [12] and that such newspapers supply local news of national

[12] Petitioner subscribes to both the Associated Press and the United Press services. *Editor and Publisher International Year Book* (1945), p. 102.

interest to those wire services. Similarly in No. 63, petitioner admits that a daily average of 278 of a total circulation of 27,470 of the Paterson Evening News is to readers outside the State of New Jersey (R. 20).[13] This petitioner, like the Oklahoma Press Company, subscribes to both the Associated Press and United Press services. *Editor and Publisher International Year Book* (1945) p. 80. If the allegation of the Administrator standing alone were insufficient to justify enforcement of the subpoena, the showing of these additional facts was certainly adequate to indicate that the investigations were not unwarranted.

III

THE SUBPOENAS HERE INVOLVED COMPLY FULLY WITH THE REQUIREMENTS OF THE FOURTH AMENDMENT

In asserting that the subpoenas infringe their rights under the Fourth Amendment,[14] petitioners

[13] That the number of papers regularly sent outside the State is small does not render the interstate activity of the petitioners immune from Congressional regulation and the Act makes "no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer", *United States* v. *Darby*, 312 U. S. 100, 123. Besides, the interstate circulation is only one of the circumstances of petitioners' activities which bears on the application of the Act to their various employees. *Fleming* v. *Lowell Sun Co.*, *supra*, 36 F. Supp. at 326. See also *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564.

[14] It is not clear whether petitioner in No. 61 makes this contention, but since page 12 of the brief may be thought to

rely chiefly upon the case of *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298. In the *American Tobacco* case, however, the subpoena was not limited to documents which would have been material or relevant to a lawful inquiry, but extended to substantially all of the respondent's papers "relevant or irrelevant, in the hope that something [would] turn up." (264 U. S. at p. 306.) See *Fleming* v. *Montgomery Ward & Co.*, 114 F. 2d 384 (C. C. A. 7), certiorari denied, 311 U. S. 690. If the demand of a subpoena is reasonably specific and limited to documents pertinent to the inquiry then in progress, the requirements of the Fourth Amendment are satisfied. *Wilson* v. *United States*, 221 U. S. 361, 376; *Essgee Co.* v. *United States*, 262 U. S. 151, 157; *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Comm.*, 221 U. S. 612, 622.

These decisions are a sufficient answer to petitioners' attempt to analogize the subpoenas here to the writs of assistance which provoked James Otis' eloquent attack. If these decisions are reexamined in the light of Otis' speech in 1761 in *Paxton's Case*, Quincy's (Mass.) Reports (1761–1772) 51, and of other data bearing upon the historical meaning of the Fourth Amendment, their interpretation of the Amendment is confirmed. Historically, the Fourth Amendment was

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incorporate the argument made in Point 2 of the brief in No. 63, we have treated the point as though made in both cases.

based on the provision in the Declaration of Rights of the Massachusetts Constitution of 1780,[15] which in turn was aimed at the evils of the writs of assistance. The vice of these writs was that they were general, authorizing searches in any place for "uncustomed" goods; they were universal, directed to all the King's subjects; they were transferable; and they were perpetual, requiring no return. It was these features to which the colonists objected and which they later wished to prohibit. In John Adams' account of James Otis' speech in *Paxton's Case*, it is made clear that it was the generality of the writs of assistance which was the basis of objection. Otis said:

> In the first place, may it please your Honors, I will admit that writs of one kind may be legal; that is, special writs, directed to special officers, and to search certain houses, etc., specially set forth in the writ, may be granted by the Court of Exchequer at home, upon oath made before the Lord Treasurer by the person who asks it, that he suspects such goods to be concealed in those very places he desires to search. * * *

[15] Art. XIV: "Every subject has a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases and with the formalities prescribed by the laws.

> I rely on it, that the writ prayed for in this petition, being general, is illegal. * * * * * * special writs may be granted *on oath and probable suspicion.* [Italics in the original.] Adams, Works, II, 524, 525.

See also Quincy's (Mass.) Reports (1761–1772) 51*ff.*, and the historical essay on writs of assistance by Horace Gray, *ibid.*, 395–540. Where, as here, there is no element of compulsory self-incrimination (cf. *Boyd* v. *United States*, 116 U. S. 616), the Fourth Amendment has been consistently interpreted in accordance with this historical background.

The subpoenas in the instant cases have no oppressive features. They are specific. They call for records clearly relevant to the inquiry which the Administrator was conducting under the authority of the statute. That in No. 61 (R. 11) is limited to specific books and papers showing the wages and hours of the Oklahoma Press Publishing Company's employees during a particular period and those showing the sources and receipt of out-of-State news and advertising and the out-of-State distribution of newspapers during the same period. That in No. 63 (R. 8–9) calls for the production of the News Printing Company's records showing the wages paid to and the hours worked by its employees and pertaining to the goods sold, transported, or offered for transportation, all with respect to a designated place of

business and for a specified period. The demands are specific and definite and such that those to whom they are addressed could not misunderstand what they were required to produce.

In No. 63 petitioner argues[16] that the Circuit Court of Appeals' decision, permitting the Administrator "in the absence of complaint" to subpoena its records to determine whether or not it had violated the Act, infringes rights guaranteed by the Fourth Amendment. Petitioner quotes the District Court's statement that the subpoena was issued "without complaint and simply in quest of information upon which to base proceedings, should they be justified" (R. 25, br. 15). It is not clear from the brief whether the infirmity claimed is the absence of a formal complaint by the Administrator charging violations before the issuance of the subpoena, or the absence of any complaint from third persons to the Administrator. If the objection is that the Administrator had issued no formal complaint charging a violation of the Act (the procedure under the Public Contracts Act), the objection is irrelevant. Under the Fair Labor Standards Act the Administrator has no authority to issue complaints, and no constitutional limitation is offended by the failure of the statute to provide for a formal administrative charge or complaint prior to investigation. See *Hale* v. *Henkel,* 201 U. S. 43.

[16] See fn. 14, *supra.*

If the objection is that no complaint had been made to the Administrator,[17] petitioner's argument that investigation without the existence of such a complaint was contrary to the Congressional intent is plainly devoid of substance. Section 11 (a) makes it the very purpose of the investigation to uncover violations and does not contemplate that the Administrator shall withhold inquiry until prodded by the complaint of one who is under no duty to discover violations. Nevertheless, the brief in No. 63 (pp. 16–18) develops at length an alleged controversy between Congress and a former Administrator of the Wage and Hour Division as to the manner in which appropriations should be expended upon inspections in the absence of such complaints. This history would be irrelevant in any event since the issue as to the most efficient use of appropriations is a matter between Congress and the Administrator

[17] The record does not support a statement that no complaint had in fact been made to the Administrator. The subpoena recites that the investigation was "of complaints of violations" (R. 8). Paragraph 6 of the return to the order to show cause apparently denies "on information and belief" (R. 17) that there had been complaint of violations lodged against petitioner with the Administrator, but Judge Meaney made no findings of fact on this or any of the other factual matters in issue. Judge Meaney's statement in his opinion quoted above seems plainly to refer to the circumstance that no administrative complaint preceded the investigation and was apparently made for the purpose of distinguishing the procedure in this case from that under the Public Contracts Act.

and not one to be determined in litigation between the Administrator and employers under investigation.

Nevertheless it should be stated that the petitioner completely misinterprets the controversy in suggesting that Congress had disapproved of any practice which involved the making of investigations under Section 11 (a) prior to the receipt of complaints from competitors, employees, or others that violations were occurring in an employer's plants. The conflict in 1941 and 1942 between the Administrator and members of the House Appropriations Committee arose over the desire of the Administrator to make a periodic routine inspection of every plant in the United States that might be covered by the Act. Although the Senate was apparently willing to appropriate money for that purpose, the House of Representatives objected and appropriated money adequate only for the routine investigation of about 25 percent of these plants—approximately 75,000—in addition to plants against which complaints had been made to the Administrator.[18] 87 Cong. Rec. 5682–3 (1941). In fact, when it was suggested by the Administrator that the Congressional policy seemed to limit his investigation to

[18] The reduction in appropriation below the budget estimates made for the fiscal year 1942 was caused by the fact that there were unexpended balances in the preceding year and the House thought it unnecessary to increase the appropriation. 87 Cong. Rec. 4629, 5683 (1941).

those cases in which he had received complaints, Representative Tarver, who was in charge of the bill, specifically repudiated that interpretation.[19] 87 Cong. Rec. 5683 (1941). The comment in the report on the Appropriation Bill for 1943 which petitioner quotes at page 17 of its brief referred to what the Committee took to be a continued attempt by the Administrator to inspect every plant which he believed might be covered by the Act.[20] Since that time no question has been raised with respect to the inspection policy, which complies with that proposed by Representative Tarver in 1941. In the hearings on the Appropriation Bill for 1945[21] this policy was approved by members of the committee, and in hearings on the 1946 appropriation no question was raised with regard to it.

IV

THE APPLICATION OF THE WAGE AND HOURS STANDARDS OF THE ACT TO THOSE IN THE NEWSPAPER PUBLISHING BUSINESS DOES NOT VIOLATE THE CONSTITUTIONAL GUARANTY OF A FREE PRESS

It is well settled by the decisions of this Court that the press as such is not immune from the ap-

[19] See also Hearings before the Subcommittee of the House Appropriations Committee on the Department of Labor-Federal Security Agency Appropriation Bill for 1942, 77th Cong., 1st sess., pp. 347–350.

[20] See id., Hearings, 1943, 77th Cong., 2d sess. (1942), pp. 281–4.

[21] Id., Hearings, 1945, 78th Cong., 2d sess. (1941), pp. 403–4.

plication of general laws. In the light of the opinions of all the Justices in *Associated Press* v. *United States,* Nos. 57, 58, 59, October Term, 1944, confirming the view which was taken in *Associated Press* v. *National Labor Relations Board,* 301 U. S. 103, repetition of the argument in support of this proposition is superfluous.

Petitioners argue that application of the Fair Labor Standards Act to newspapers will increase their cost of doing business and hence amounts to a restriction of freedom of the press. The fact that the cost of doing business is increased by application of the Act no more infringes the guaranty of the First Amendment than does the increased cost of doing business which is entailed by the imposition of property and income taxes upon newspapers. The freedom of the press is not abridged by protection of the employees of newspapers from working under substandard labor conditions. The First Amendment is not a guaranty of profits. The regulation here does not "trespass upon the domains set apart for free speech" (*Thomas* v. *Collins,* 323 U. S. 516, 532) any more than do safety and sanitary laws, zoning ordinances, or wartime allocation and priority controls. There is here no attempt at a "guardianship of the public mind" such as was involved in *Largent* v. *Texas,* 318 U. S. 418, or any form of censorship or previous restraint of discussion condemned in *Bridges* v. *California,* 314 U. S. 252; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Thornhill*

v. *Alabama*, 310 U. S. 88; *Schneider* v. *State*, 308 U. S. 147; *Hague* v. *C. I. O.*, 307 U. S. 496; *Lovell* v. *Griffin*, 303 U. S. 444; or *Near* v. *Minnesota*, 283 U. S. 697.

Even though freedom of the press is "in a preferred position" (*Murdock* v. *Pennsylvania*, 319 U. S. 105, 115; *Follett* v. *McCormick*, 321 U. S. 573), the press is not free from all regulatory measures. Although a license tax on the right to distribute books and pamphlets may be invalid as a direct restriction of circulation and as a restraint equally obnoxious to that imposed by censorship or previous restraint, the Fair Labor Standards Act is neither a tax nor a direct restraint. The preferred position to which the press is entitled is based on its function as a medium of public information. Insofar as a newspaper is a business for profit it is not entitled to immunity from the public policies applicable to other businesses, such as those embodied in the National Labor Relations Act and the Fair Labor Standards Act.

The final argument that the exemption of certain weekly newspapers of local circulation by Section 13 (a) (8) of the Act is a discriminatory classification which invalidates the application of Sections 6 and 7 to the petitioners is plainly without substance. This court has pointed out time and again that the Fifth Amendment does not require the full and uniform exercise of the commerce power and that Congress may weigh

relative needs and limit the application of particular legislative policies. *Steward Mach. Co.* v. *Davis,* 301 U. S. 548; *Currin* v. *Wallace,* 306 U. S. 1. See also *Sun Publishing Co.* v. *Walling,* 140 F. 2d 445, 448 (C. C. A. 6), certiorari denied, 322 U. S. 728. The discriminatory tax involved in *Grosjean* v. *American Press,* 297 U. S. 233, 250–251, was held invalid because it was found to be a "deliberate and calculated device" to penalize "a selected group of newspapers." This Court has never suggested that either the First or the Fifth Amendment requires Congress to regulate or tax all sources of public information alike or not at all.

CONCLUSION

For the foregoing reasons, the decisions of the Circuit Courts of Appeals should be affirmed.

Respectfully submitted.

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OCTOBER 1945.

APPENDIX

Fair Labor Standards Act, c. 676, 52 Stat. 1060 (29 U. S. C. 201 et seq.):

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

* * * * *

SEC. 11 (a). The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in

section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

SEC. 13 (a).

The provisions of sections 6 and 7 shall not apply to . . . (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published;

Federal Trade Commission Act, 38 Stat. 717 (15 U. S. C. 49):

SEC. 9.

* * * * *

* * * in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

* * * * *

No person shall be excused from attending and testifying or from producing docu-

mentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided,* That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

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SUPREME COURT OF THE UNITED STATES.

Nos. 61, 63.—October Term, 1945.

Oklahoma Press Publishing Company, Petitioner, *vs.* L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.
61	
New Printing Co., Inc., Petitioner, *vs.* L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.
63	

[February 11, 1946.]

Mr. Justice Rutledge delivered the opinion of the Court.

These cases bring for decision important questions concerning the Administrator's right to judicial enforcement of *subpoenas duces tecum* issued by him in the course of investigations conducted pursuant to § 11(a) of the Fair Labor Standards Act. 52 Stat. 1060. His claim is founded directly upon § 9, which incorporates the enforcement provisions of §§ 9 and 10 of the Federal Trade Commission Act, 38 Stat. 717.[1] The subpoenas sought the production of specified records to determine whether petitioners were violating the Fair Labor Standards Act, including records relating to coverage. Petitioners, newspaper publishing corporations, maintain that the Act is not applicable to them, for constitutional and other reasons, and insist that the question of coverage must be adjudicated before the subpoenas may be enforced.

In No. 61, involving the Oklahoma Press Publishing Company, the Circuit Court of Appeals for the Tenth Circuit has rejected this view, holding that the Administrator was entitled to enforce-

[1] The pertinent portions of these various statutory provisions are set forth in notes 23 and 24.

ment upon showing of "probable cause," which it found had been made. 147 F. 2d 658. Accordingly it affirmed the District Court's order directing that the Administrator be given access to the records and documents specified.[2]

In No. 63, the Circuit Court of Appeals for the Third Circuit likewise rejected the company's position, one judge dissenting on the ground that probable cause had not been shown. 148 F. 2d 57. It accordingly reversed the District Court's order of dismissal in the proceeding to show cause, which in effect denied enforcement for want of a showing of coverage. 49 F. Supp. 659.[3] The Court of Appeals thought that requiring the Administrator "to make proof of coverage would be to turn the proceeding into a suit to decide a question which must be determined by the Administrator in the course of his investigation" and relied upon *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, as being persuasive that this could not be done. Regarding the subpoena as containing no unreasonable demand, it conceived the return and affidavits filed by the company, together with the Administrator's allegations of coverage,[4] as a showing sufficient to require enforcement. Hence it directed that the District Court's discretion be exercised with that effect.

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[2] Upon filing of the application, an order to show cause why enforcement should not be had was issued. Thereafter the matter was heard upon the pleadings, including the application and the respondent's return, together with affidavits filed by the parties. See note 4; also note 52 *infra*. The District Court made findings of fact and conclusions of law, see 7 Wage Hour Rep. 665, which among other things determined "that the Company herein is subject to the Wage and Hour Act"; and issued its order for inspection accordingly. As to this finding and conclusion the Court of Appeals said: "When the matter was submitted to the trial court on the rule to show cause, it concluded coverage, but it did not have to go that far." 147 F. 2d 658, 662.

[3] In No. 63, as in No. 61, an order to show cause issued on filing of the application. Upon return made, which included affidavits attached as exhibits, the Court rendered its opinion and entered its order dismissing the proceedings, stating however that since the Administrator "has not had opportunity sufficiently to argue the question of coverage, that matter is left to such further proceedings as may be appropriate. . . ." 49 F. Supp. 659, 661. The opinion, noting that to deny enforcement "would be to divide the proceedings into two distinct stages," one "concerning the presence of 'Commerce,' the other to determine other elements of violation," went on to say: "There would seem to be no compelling reason why such should not be the case, for if the act does not apply to a certain business or part of an industry, it would seem to follow that the provisions of the act should not be applied thereto. . . ." 49 F. Supp. at 660.

[4] See note 53. The allegations of coverage in both applications were made upon information and belief and were general rather than specific

Because of the importance of the issues for administration of the Act and also on account of the differences in the grounds for the two decisions, as well as between them and decisions from other circuits,[5] certiorari was granted in both cases. 325 U. S. 845.

The issues have taken wide range. They are substantially the same in the two causes, except in one respect to be noted.[6] In addition to an argument from Congress' intent, reliance falls upon various constitutional provisions, including the First, Fourth and Fifth Amendments, as well as the limited reach of the commerce clause, to show that the Administrator's conduct and the relief he seeks are forbidden.

I.

Coloring almost all of petitioners' position, as we understand them, is a primary misconception that the First Amendment knocks out any possible application of the Fair Labor Standards Act to

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or evidentiary in character. Each application set forth that the respondent was engaged in the business of publishing a newspaper or newspapers and by virtue of that activity was engaged in interstate commerce or in the production of goods for such commerce within the meaning of the Act.

In No. 61 the further allegations appeared that in the course of its business the company "receives and sends daily news, intelligence, and communications in interstate commerce, and transports, ships and delivers goods produced by it from points within" to points outside Oklahoma; and that the Administrator "having reasonable grounds to believe that the company" was violating specified sections of the Act, entered to make an investigation as provided in § 11(a), was refused permission to inspect records, etc.

Apart from one affidavit filed by the Administrator in No. 61 setting forth the circumstances of the company's failure to appear in response to the subpoena, no other facts, beyond the allegations of the application, were submitted by him in either case. The companies however filed affidavits in both proceedings, which supplied additional facts, as well as the affiants' conclusions, concerning coverage. See text, Part IV, at notes 52, 53.

[5] Specifically, General Tobacco & Grocery Co. *v.* Fleming, 125 F. 2d 596 (C. C. A. 6), modified in Walling *v.* La Belle Steamship Co., 148 F. 2d 198, following the decision in Endicott Johnson Corp. *v.* Perkins, 317 U. S. 501, as to which see note 49 *infra* and text. The decisions in other circuits which have passed on the matter are substantially in accord with the results in No. 61. See Martin Typewriter Co. *v.* Walling, 135 F. 2d 918 (C. C. A. 1); Walling *v.* Standard Dredging Corp., 132 F. 2d 322 (C. C. A. 2); Walling *v.* American Rolbal Corp., 135 F. 2d 1003 (C. C. A. 2); Cudahy Packing Co. *v.* Fleming, 119 F. 2d 209 (C. C. A. 5), rev'd on other grounds, 315 U. S. 357; Cudahy Packing Co. *v.* Fleming, 122 F. 2d 1005 (C. C. A. 8), rev'd on other grounds, 315 U. S. 785; Mississippi Road Supply Co. *v.* Walling, 136 F. 2d 391 (C. C. A. 5); Fleming *v.* Montgomery Ward Co., 114 F. 2d 384 (C. C. A. 7); Walling *v.* Benson, 137 F. 2d 501 (C. C. A. 8).

[6] See Part IV.

the business of publishing and distributing newspapers. The argument has two prongs.

The broadside assertion that petitioners "could not be covered by the Act," for the reason that "application of this Act to its newspaper publishing business would violate its rights as guaranteed by the First Amendment," is without merit. *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, and *Associated Press* v. *United States*, 326 U. S. 1; *Mabee* v. *White Plains Pub. Co.*, No. 57, decided this day.[7] If Congress can remove obstructions to commerce by requiring publishers to bargain collectively with employees and refrain from interfering with their rights of self-organization, matters closely related to eliminating low wages and long hours, Congress likewise may strike directly at those evils when they adversely affect commerce. *United States* v. *Darby*, 312 U. S. 100, 116, 117. The Amendment does not forbid this or other regulation which ends in no restraint upon expression or in any other evil outlawed by its terms and purposes.[8]

Petitioners' narrower argument, of allegedly invalid classification,[9] arises from the statutory exemptions and may be shortly dismissed. The intimation that the Act falls by reason of the exclusion of seamen, farm workers and others by § 13(a) is hardly more than a suggestion and is dismissed accordingly. Cf. *Buck* v. *Bell*, 274 U. S. 200, 208. The contention drawn from the exemption of employees of small newspapers by § 13(a)(8) deserves only slightly more attention.[10] It seems to be twofold, that the amendment forbids Congress to "regulate the press by classifying

[7] See also Sun Publishing Co. v. Walling, 140 F. 2d 445; Fleming v. Lowell Sun Co., 36 F. Supp. 320, rev'd on other grounds, 120 F. 2d 213, affirmed, 315 U. S. 784.

[8] No question is presented whether Congress could enforce its mandate by excluding from commerce the circulation of a publisher refusing to conform. Cf. Sun Publishing Co. v. Walling, 140 F. 2d 445, 449.

[9] Since the Fifth Amendment, unlike the Fourteenth, contains no "equal protection" clause petitioners burden due process with this duty here.

[10] The provision is as follows: "Sec. 13(a): The provisions of sections 6 and 7 shall not apply with respect to . . . (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed or published."

The exemption shows conclusively that Congress intended the Act to apply to employees of publishers not within the terms of the exemption.

it" at all and in any event that it cannot use volume of circulation or size as a factor in the classification.[11]

Reliance upon *Grosjean* v. *American Press Co.*, 297 U. S. 233, to support these claims is misplaced. There the state statute singled out newspapers for special taxation and was held in effect to graduate the tax in accordance with volume of circulation. Here there was no singling out of the press for treatment different from that accorded other business in general. Rather the Act's purpose was to place publishers of newspapers upon the same plane with other businesses and the exemption for small newspapers had the same object. 83 Cong. Rec. 7445. Nothing in the *Grosjean* case forbids Congress to exempt some publishers because of size from either a tax or a regulation which would be valid if applied to all.

What has been said also disposes of the contention drawn from the scope of the commerce power and its applicability to the publishing business considered independently of the Amendment's influence. *Associated Press* v. *National Labor Relations Board*, *supra*; *Associated Press* v. *United States*, *supra*.

II.

Other questions pertain to whether enforcement of the subpoenas as directed by the Circuit Courts of Appeals will violate any of petitioners' rights secured by the Fourth Amendment and related issues concerning Congress' intent. It is claimed that enforcement would permit the Administrator to conduct general fishing expeditions into petitioners' books, records and papers, in order to secure evidence that they have violated the Act, without a prior charge or complaint and simply to secure information upon which to base one, all allegedly in violation of the Amendment's search and seizure provisions. Supporting this is an argument that Congress did not intend such use to be made of the delegated power, which rests in part upon asserted constitutional implications but primarily upon the reports of legislative committees, particularly in the House of Representatives, made in passing upon appropriations for years subsequent to the Act's effective date.[12]

[11] To support these views, petitioners give interesting statistics concerning the total number of papers in the country, the number published daily, daily and Sunday, weekly, semiweekly and triweekly, and the number in each group having more or less than 3,000 circulation.

[12] See note 21. The Act became effective June 25, 1938.

The short answer to the Fourth Amendment objections is that the records in these cases present no question of actual search and seizure, but raise only the question whether orders of court for the production of specified records have been validly made; and no sufficient showing appears to justify setting them aside.[13] No officer or other person has sought to enter petitioners' premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise than pursuant to orders of court authorized by law and made after adequate opportunity to present objections, which in fact were made.[14] Nor has any objection been taken to the breadth of the subpoenas or to any other specific defect which would invalidate them.[15]

What petitioners seek is not to prevent an unlawful search and seizure. It is rather a total immunity to the Act's provisions, applicable to all others similarly situated, requiring them to submit their pertinent records for the Administrator's inspection under every judicial safeguard, after and only after an order of court made pursuant to and in exact compliance with authority granted by Congress. This broad claim of immunity no doubt is induced by petitioners' First Amendment contentions. But beyond them it is rested also upon conceptions of the Fourth Amendment equally lacking in merit.

Petitioners' plea that the Fourth Amendment places them so far above the law that they are beyond the reach of congressional and judicial power as those powers have been exerted here only raises the ghost of controversy long since settled adversely to their claim.[16] They have advanced no claim founded on the Fifth Amendment's somewhat related guaranty against self-incrimination, whether or not for the sufficient reason among others that this privilege gives no protection to corporations or their officers against the production of corporate records pursuant to lawful judicial order, which is all these cases involve.[17]

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[13] As to the sufficiency of the showing, see Part IV.

[14] Cf. notes 2, 3, 4. The facts in both cases show that petitioners, when served with the subpoenas, declined to honor them upon the advice of counsel, and thereafter the Administrator applied to the court for enforcement in each case.

[15] Cf. text *infra* at notes 42-47: see also note 40.

[16] See the authorities cited in notes 31 and 32.

[17] Hale v. Henkel, 201 U. S. 43; Wilson v. United States, 221 U. S. 361; Essgee Co. v. United States, 262 U. S. 151; United States v. Bausch & Lomb Optical Co., 321 U. S. 707, 726; cf. United States v. White, 322 U. S. 694.

The cited authorities would be sufficient to dispose of the Fourth Amendment argument, and more recent decisions confirm their ruling.[18] Petitioners however are insistent in their contrary views, both upon the constitutional phases and in their asserted bearing upon the intention of Congress. While we think those views reflect a confusion not justified by the actual state of the decisions, the confusion has acquired some currency, as the divided state of opinion among the circuits shows.[19] Since the matter is of some importance, in order to remove any possible basis for like misunderstanding in the future, we give more detailed consideration to the views advanced and to the authorities than would otherwise be necessary.

There are two difficulties with petitioners' theory concerning the intent of Congress. One is that the argument from the so-called legislative history flies in the face of the powers expressly granted to the Administrator and the courts by §§ 9 and 11(a), so flatly that to accept petitioners' view would largely nullify them.[20] Furthermore the excerpted history from the later appropriation matters does not give the full story and when that is considered the claimed interpretation is not made out, regardless of its retrospective aspect.[21] Moreover, the statute's language

[18] Endicott Johnson Corp. *v.* Perkins, 317 U. S. 501; Myers *v.* Bethlehem Corp., 303 U. S. 41, discussed *infra*, Part III, at notes 49-51.

[19] Cf. note 5 and text.

[20] In such a situation, without an accompanying change in the statute's language, an expression in committee reports on subsequent appropriations, coming largely from one house, hardly can be held to change or qualify the plain and unambiguous wording of the statute. Such a result would amount to retroactive amendment by committee report, a step in construction by reference to "prospective legislative history" not heretofore taken.

[21] The controversy as to appropriations arose over the Administrator's request for sufficient funds to allow a periodic routine inspection of every plant that might be covered by the Act. See Hearings before the Subcommittee of the Committee on Appropriations of the House of Representatives on the Department of Labor—Federal Security Agency Appropriation Bill for 1942, 77th Cong., 1st Sess., Pt. 1, 347-350. The Senate had acceded to this request. But the House Appropriations Committee thought the cost unjustifiable and therefore recommended that only enough funds be made available to permit the Administrator to make "spot inspections" of twenty-five per cent of the plants and also to permit him to inspect all plants against which complaints had actually been registered. H. R. Rep. No. 688, 77th Cong., 1st Sess., 13-14; see also 87 Cong. Rec. 4629, 5682-5683. After the conferees had been unable to come to an agreement and the House had instructed its conferees to insist on the smaller appropriation, 87 Cong. Rec. 5682-5686, the Senate accepted the House version of the appropriation bill. 87 Cong. Rec. 5703.

In the following year, 1942, the House Appropriations Committee noted with disapproval that "the spot-checking system approved by the Congress"

leaves no room to doubt that Congress intended to authorize just what the Administrator did and sought to have the courts do.[22]

Section 11(a) expressly authorizes the Administrator to "enter and inspect such places and such records (and make such transcriptions), question such employees, and investigate such facts, conditions, practices or matters as he may deem appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act."[23] The subpoena power conferred by § 9 (through

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had not been adopted and reiterated its desire that the recommended procedure be followed. H. Rep. No. 2200, 77th Cong., 2d Sess., 8. See also Hearings before the Subcommittee of the Committee on Appropriations of the House of Representatives on the Department of Labor—Federal Security Agency Appropriation Bill for 1943, 77th Cong., 2d Sess., Pt. 1, 281-284; cf. Hearings before the Subcommittee of the Committee on Appropriations of the House of Representatives on the Department of Labor—Federal Security Agency Appropriation Bill for 1945, 78th Cong., 2d Sess., Pt. 1, 403-405.

This history falls far short of sustaining the view that Congress had no intent, either when the statute was enacted or later, that the Administrator should have the powers of investigation expressly and clearly conferred upon him.

[22] The sparse legislative history bearing on the question contains nothing to the contrary. The bills originally introduced did not incorporate §§ 9 and 10 of the Federal Trade Commission Act but contained substantially similar provisions. S. 2475, 75th Cong., 1st Sess., § 15, 81 Cong. Rec. 4961; H. R. 7200, 75th Cong., 1st Sess., § 15, 81 Cong. Rec. 4998. The House Committee on Labor reported of this section (then § 12) that it "contains the usual administrative provisions authorizing the Board to conduct investigations, subpena witnesses, and compel testimony." H. Rep. No. 1452, 75th Cong., 1st Sess., 18, also page 10. The Senate Committee used the same language. Sen. Rep. No. 884, 75th Cong., 1st Sess., 8. The House bill having been recommitted to the Committee, 82 Cong. Rec. 1834-1835, it drafted the subpoena section (then § 7) into essentially its present form. See H. R. Rep. No. 2182, 75th Cong., 2d Sess., 3, 11. The only substantial difference was that the subpoena power was given for the purpose of any "hearing" but not for the purpose of any "investigation." However, § 15(b) of the bills introduced in both houses, *supra*, granted the subpoena power "for the purpose of any investigation or any other proceeding under this Act. . . ." And compare § 15(a). The difference was remedied by the Senate and House conferees; for out of conference came § 9 as it is now written. 83 Cong. Rec. 9160; 83 Cong. Rec. 9248, 9254. See also Cudahy Packing Co. *v.* Holland, 315 U. S. 357, 362, n. 3.

Nothing in the reports or the discussion suggests that the power was not to be exercised, or that subpoenas issued in compliance with the terms of the statute were not to be enforced, exactly in accordance with the authority given.

[23] Section 11(a) is as follows: "The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of

adoption of § 9 of the Federal Trade Commission Act) is given in aid of this investigation and, in case of disobedience, the district courts are called upon to enforce the subpoena through their contempt powers,[24] without express condition requiring showing of coverage.[25]

In view of these provisions, with which the Administrator's action was in exact compliance, this case presents an instance of

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Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act."

The section thus authorizes both general and specific investigations, one for gathering statistical information concerning entire industries, cf. Walling v. American Rolbal Corp., 135 F. 2d 1003, the other to discover specific violations. The pattern has become common since its introduction into federal law by the Interstate Commerce Commission legislation. See the summary given as to both federal and state instances in Handler, The Constitutionality of Investigations by the Federal Trade Commission (1928) 28 Col. L. Rev. 708, 905, at 905-909; see also 925-929.

[24] Section 9 of the Fair Labor Standards Act reads: "For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers and duties of the Administrator, the Chief of the Children's bureau, and the industry committees."

Section 9 of the Federal Trade Commission Act, 38 Stat. 717, provides that, for the purposes of the authorized investigations, the Commission or its agents shall have access to and the right to copy "any documentary evidence of any corporation being proceeded against," with the power to require by subpoena "the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation."

The section then proceeds: " . . . in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

"Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

Section 9 also contains a provision for immunity of individuals from prosecution, penalty or forfeiture on account of testimony or evidence produced in response to the subpoena.

Section 10 imposes criminal penalties upon "any person who shall refuse or neglect to attend and testify, or to answer any lawful inquiry or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission." No question is presented in these cases concerning this provision.

[25] See Part IV, at note 54; also note 24.

"the most explicit language"[26] which leaves no room for questioning Congress' intent. The very purpose of the subpoena and of the order, as of the authorized investigation, is to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the Administrator's judgment, the facts thus discovered should justify doing so.

Accordingly, if §§ 9 and 11(a) are not to be construed as authorizing enforcement of the orders, it must be, as petitioners say, because this construction would make them so dubious constitutionally as to compel resort to an interpretation which saves rather than to one which destroys or is likely to do so. The Court has adopted this course at least once in this type of case.[27] But if the same course is followed here, the judgments must be reversed with the effect of cutting squarely into the power of Congress. For to deny the validity of the orders would be in effect to deny not only Congress' power to enact the provisions sustaining them, but also its authority to delegate effective power to investigate violations of its own laws, if not perhaps also its own power to make such investigations.

III.

The primary source of misconception concerning the Fourth Amendment's function lies perhaps in the identification of cases involving so-called "figurative" or "constructive" search with cases of actual search and seizure.[28] Only in this analogical sense

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[26] See note 27.

[27] See Federal Trade Commission *v.* American Tobacco Co., 264 U. S. 298, 305-306, in which Mr. Justice Holmes speaking for the Court said: "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, 479), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent." See also note 40. Cf. Boyd *v.* United States, 116 U. S. 616; Hale *v.* Henkel, 201 U. S. 43; Harriman *v.* Interstate Commerce Commission, 211 U. S. 407.

[28] "In other words, the subpoena is equivalent to a search and seizure and to be constitutional it must be a *reasonable* exercise of the power." Lasson, Development of the Fourth Amendment to the United States Constitution, 137, citing Interstate Commerce Commission *v.* Brimson, 154 U. S. 447; Hale *v.* Henkel, 201 U. S. 43, 76. Cf. Boyd *v.* United States, 116 U. S. at 634-635 (as to which see also notes 33 and 36): "... We are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited ... is the equivalent of a search and seizure—

can any question related to search and seizure be thought to arise in situations which, like the present ones, involve only the validity of authorized judicial orders.

The confusion is due in part to the fact that this is the very kind of situation in which the decisions have moved with variant direction, although without actual conflict when all of the facts in each case are taken into account. Notwithstanding this, emphasis and tone at times are highly contrasting, with consequent overtones of doubt and confusion for validity of the statute or its application. The subject matter perhaps too often has been generative of heat rather than light, for the border along which the cases lie is one where government intrudes upon different areas of privacy and the history of such intrusions has brought forth some of the stoutest and most effective instances of resistance to excess of governmental authority.[29]

The matter of requiring the production of books and records to secure evidence is not as one-sided, in this kind of situation, as the most extreme expressions of either emphasis would indicate. With some obvious exceptions, there has always been a real problem of balancing the public interest against private security. The cases for protection of the opposing interests are stated as clearly as anywhere perhaps in the summations, quoted in the margin,[30] of two former members of this Court, each of whom was

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and an unreasonable search and seizure—within the meaning of the Fourth Amendment."

See also Handler, Constitutionality of Investigations of the Federal Trade Commission (1928) 28 Col. L. Rev. 708, 905, at 909 ff., and authorities cited, characterizing the identification of an order for production with an actual search or seizure as "the figurative interpretation." P. 917, n. 56.

[29] See, in addition to the better known accounts of writs of assistance cited in Goldman v. United States, dissenting opinion, 316 U. S. at 139, n. 5, Lasson, Development of the Fourth Amendment to the United States Constitution (1937).

[30] The case for protection of the public interest was stated as follows: "The opinion of the court reminds us of the dangers that wait upon the abuse of power by officialdom unchained. The warning is so fraught with truth that it can never be untimely. But timely too is the reminder, as a host of impoverished investors will be ready to attest, that there are dangers in untruths and half truths when certificates masquerading as securities pass current in the market. There are dangers in spreading a belief that untruths and half truths, designed to be passed on for the guidance of confiding buyers, are to be ranked as peccadillos, or even perhaps as part of the amenities of business. . . . A Commission which is without coercive powers, which cannot arrest or amerce or imprison though a crime has been uncovered, or even punish for contempt, but can only inquire and report, the propriety of every question in the course of the inquiry being subject to the supervision of the ordinary courts of justice, is likened with denunciatory fervor to the Star

fully alive to the dual necessity of safeguarding adequately the public and the private interest. But emphasis has not always been so aptly placed.

The confusion, obscuring the basic distinction between actual and so-called "constructive" search has been accentuated where the records and papers sought are of corporate character, as in these cases. Historically private corporations have been subject to broad visitorial power, both in England and in this country. And it long has been established that Congress may exercise wide investigative power over them, analogous to the visitorial power of the incorporating state,[31] when their activities take place within or affect interstate commerce.[32] Correspondingly it has been settled

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Chamber of the Stuarts. Historians may find hyperbole in the sanguinary simile." Mr. Justice Cardozo, with whom joined the present Chief Justice and Mr. Justice Brandeis, dissenting in *Jones v. Securities and Exchange Commission*, 298 U. S. 1, 32-33. See also Handler, Constitutionality of Investigations of the Federal Trade Commission (1928) 28 Col. L. Rev. 708, 905, particularly at 933 ff.

On the other hand, the case for protected privacy was put by Mr. Justice Brandeis, dissenting, in *Olmstead v. United States*, 277 U. S. 438, 478-479: "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive right and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth."

[31] *Wilson v. United States*, 221 U. S. 361, 382; *Hale v. Henkel*, 201 U. S. 43, 74-75; The Fourth and Fifth Amendments and the Visitorial Power of Congress over State Corporations, Note (1930) 30 Col. L. Rev. 103.

[32] *Ibid.*; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447; *Interstate Commerce Commission v. Baird*, 194 U. S. 25; *Baltimore & Ohio R. R. v. Interstate Commerce Commission*, 221 U. S. 612; *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194; *United States v. Louisville & N. R. R.*, 236 U. S. 318; *Smith v. Interstate Commerce Commission*, 245 U. S. 33; *United States v. New York Central R. R.*, 272 U. S. 457; cf., however, *Harriman v. Interstate Commerce Commission*, 211 U. S. 407; *Federal Trade Commission v. Claire Furnace Co.*, 274 U. S. 160. And see Handler, Constitutionality of Investigations by the Federal Trade Commission (1928) 28 Col. L. Rev. 708, 903.

The power is not limited to inquiring concerning matters which Congress may regulate otherwise than by requiring the production of information, at any rate when it is made to appear that some phase of the activity is in commerce or affects it. See *United States v. New York Central R. R.*, 272 U. S. 457, 464, and authorities cited; *Federal Trade Commission, v. Claire Furnace Co.*, 274 U. S. 160. Nor must the "jurisdictional" line be drawn in such cases before the information is called for. Cf. *Myers v. Bethlehem Corp.*, 303 U. S. 41; Handler, *op. cit. supra*, at 918 ff., and authorities cited.

that corporations are not entitled to all of the constitutional protections which private individuals have in these and related matters. As has been noted, they are not at all within the privilege against self-incrimination, although this Court more than once has said that the privilege runs very closely with the Fourth Amendment's search and seizure provisions.[33] It is also settled that an officer of the company cannot refuse to produce its records in his possession, upon the plea that they either will incriminate him or may incriminate it.[34] And, although the Fourth Amendment has been held applicable to corporations[35] notwithstanding their exclusion from the privilege against self-incrimination, the same leading case of *Wilson* v. *United States*, 221 U. S. 361, distinguishing the earlier quite different one of *Boyd* v. *United States*, 116 U. S. 616,[36] held the process not invalid under the Fourth Amendment, although it broadly required the production of copies of letters and telegrams "signed or purported to be signed by the President of said company during the month[s] of May and June, 1909; in regard to an alleged violation of the statutes of the United States by C. C. Wilson." 221 U. S. at 375.

The *Wilson* case has set the pattern of later decisions and has been followed without qualification of its ruling.[37] Contrary sug-

[33] In the leading case of Boyd *v.* United States, 116 U. S. 616, 630, Mr. Justice Bradley, speaking for the Court in relation to the compelled production of "a man's own testimony or of his private papers [specifically a business invoice] to be used as evidence to convict him of crime or to forfeit his goods," said in a much quoted statement: "In this regard the Fourth and Fifth Amendments run almost into each other." The opinion, quoting at length from Lord Camden's discussion in the historic case of Entick *v.* Carrington, 19 Howell's State Trials, 1029, relies strongly in this phase upon his conjunction of the right to freedom from search and seizure "where the law forceth evidence out of the owner's custody by process" and the privilege against self-incrimination. 116 U. S. at 629. Cf. also the statement of Mr. Justice Brandeis, quoted *supra* note 30.

[34] Wilson *v.* United States, 221 U. S. 361; Hale *v.* Henkel, 201 U. S. 43; Interstate Commerce Commission *v.* Baird, 194 U. S. 25.

[35] Silverthorne Lumber Co. *v.* United States, 251 U. S. 385; Hale *v.* Henkel, 201 U. S. 43; Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, 448 ff. See also Consolidated Rendering Co. *v.* Vermont, 207 U. S. 541.

[36] See note 33. The ruling was limited, in view of the facts, to criminal proceedings and proceedings for forfeiture of property. Only a single document was called for. The vitiating element lay in the incriminating character of the unusual provision for enforcement. The statute provided that failure to produce might be taken as a confession of whatever might be alleged in the motion for production.

[37] See notes 31, 32, 40.

Thus far Congress has not seen fit to leave to administrative officials authority to enforce subpoenas. The pattern adopted in §§ 9 and 10 of the

gestions or implications may be explained as dicta;[38] or by virtue of the presence of an actual illegal search and seizure, the effects of which the Government sought later to overcome by applying the more liberal doctrine developed in relation to "constructive search";[39] or by the scope of the subpoena in calling for documents so broadly or indefinitely that it was thought to approach in this respect the character of a general warrant or writ of assistance, odious in both English and American history.[40] But no case has been cited or found in which, upon similar facts, the *Wilson* doctrine has not been followed. Nor in any has Congress

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Federal Trade Commission Act, of referring enforcement to the courts, has become accepted, whether by virtue of reflections of the opinion in Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, or for other reasons. The extent to which the pattern has been adopted is summarized, partially at least, in Handler, *op. cit. supra*, at 925 ff.

[38] See, for example, Essgee Co. *v.* United States, 262 U. S. 151.

[39] E. g., in Silverthorne Lumber Co. v. United States, 251 U. S. 385, government officers, after arresting corporate officials at their homes, "without a shadow of authority went to the office of their company and made a clean sweep of all the books, papers and documents found there," taking them to the district attorney's office, where they were photographed. After an order of court to return the originals, but impounding the copies, subpoenas to produce the originals were enforced by an order, the refusal to obey which was held a contempt. The Court's strong language in reversing this decision undoubtedly was called forth by the Government's effort, not to say subterfuge, thus to avoid the effects of its initial wrong. Cf. Weeks *v.* United States, 232 U. S. 383; Gouled *v.* United States, 255 U. S. 298.

[40] Thus, the aggravating circumstance in Federal Trade Commission *v.* American Tobacco Co., 264 U. S. 298, cf. note 27, seems to have been the Commission's claim of "an unlimited right of access to the respondents' papers with reference to the possible existence of practices in violation of § 5." 264 U. S. at 305. The Court said: "It is contrary to the first principles of justice to allow a search through all the respondents' records, *relevant or irrelevant*, in the hope that something will turn up." P. 306. (Emphasis added.) Cf. Silverthorne Lumber Co. *v.* United States, *supra*, note 39.

However in Wheeler *v.* United States, 226 U. S. 478, where no element of actual search and seizure was present, a subpoena was enforced which called for copies of all letters and telegrams, all cash books, ledgers, journals and other account books of the corporation covering a period of fifteen months: cf. Interstate Commerce Commission *v.* Brimson, 154 U. S. 447. And in Brown *v.* United States, 276 U. S. 134, the subpoena called for all letters, telegrams or copies thereof passing between a national trade association and its members, including their officers and agents, over a period of two and one-half years, with reference to eighteen different items. The Court, by Mr. Justice Sutherland, said: "The subpoena . . . specifies a reasonable period of time and, with reasonable particularity, the subjects to which the documents called for relate. The question is ruled, not by Hale *v.* Henkel, but by Consolidated Rendering Co. *v.* Vermont, 207 U. S. 541, 553-554, and Wheeler *v.* United States," *supra.*

With reference to the breadth of the subpoena or order for production in the scope of what is called for, in addition to the authorities cited in this note and note 45, see Hammond Packing Co. *v.* Arkansas, 212 U. S. 322, United States *v.* Bausch & Lomb Optical Co., 321 U. S. 107; Handler, *op. cit. supra*, at 913 ff.

been adjudged to have exceeded its authority, with the single exception of *Boyd* v. *United States, supra,* which differed from both the *Wilson* case and the present ones in providing a drastically incriminating method of enforcement[41] which was applied to the production of partners' business records. Whatever limits there may be to congressional power to provide for the production of corporate or other business records, therefore, they are not to be found, in view of the course of prior decisions, in any such absolute or universal immunity as petitioners seek.

Without attempt to summarize or accurately distinguish all of the cases, the fair distillation, in so far as they apply merely to the production of corporate records and papers in response to a subpoena or order authorized by law and safeguarded by judicial sanction, seems to be that the Fifth Amendment affords no protection by virtue of the self-incrimination provision, whether for the corporation or for its officers; and the Fourth, if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be "particularly described," if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.

As this has taken form in the decisions, the following specific results have been worked out. It is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command. This has been ruled most often perhaps in relation to grand jury investigations,[42] but also frequently in respect to general or statistical investigations authorized by Congress.[43] The requirement of "probable cause, supported by oath or affirmation" literally applicable in the case of a warrant is satisfied, in that of an order for production, by the

[41] See note 36.

[42] E. g., Hale *v.* Henkel, 201 U. S. 43; Wilson *v.* United States, 221 U. S. 361, 372.

[43] Smith *v.* Interstate Commerce Commission, 245 U. S. 33; Baltimore & Ohio R. R. *v.* Interstate Commerce Commission, 221 U. S. 612; cf. Interstate Commerce Commission *v.* Goodrich Transit Co., 224 U. S. 194; Harriman *v.* Interstate Commerce Commission, 211 U. S. 407, 419. And see Handler, *op. cit. supra,* 918 ff.

court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry.[44] Beyond this the requirement of reasonableness, including particularity in "describing the place to be searched, and the persons or things to be seized," also literally applicable to warrants, comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry. Necessarily, as has been said, this cannot be reduced to formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry.[45]

When these principles are applied to the facts of the present cases, it is impossible to conceive how a violation of petitioners' rights could have been involved. Both were corporations. The only records or documents sought were corporate ones. No possible element of self-incrimination was therefore presented or in fact claimed. All the records sought were relevant to the authorized inquiry,[46] the purpose of which was to determine two issues, whether petitioners were subject to the Act and, if so, whether they were violating it. These were subjects of investigation authorized by § 11(a), the latter expressly, the former by necessary implication.[47] It is not to be doubted that Congress could authorize investigation of these matters. In all these respects,[48] the specifi-

[44] Cf. the authorities cited in notes 42 and 43.

[45] Cf. Go-Bart Importing Co. *v.* United States, 282 U. S. 344, 357; Boyd *v.* United States, 116 U. S. at 630, and note 40 *supra.*

[46] The subpoena in No. 61 called for production of:

"All of your books, papers and documents showing the hours worked by and wages paid to each of your employees between October 28, 1938, and the date hereof, including all payroll ledgers, time sheets, time cards and time clock records, and all your books, papers and documents showing the distribution of papers outside the State of Oklahoma, the dissemination of news outside the State of Oklahoma, the source and receipt of news from outside the State of Oklahoma, and the source and receipt of advertisements of nationally advertised goods."

The specification in No. 63 was substantially identical except for the period of time covered by the demand.

[47] See the language of the section, note 24 *supra.* Of course violation could be found only in situations where coverage would exist. Authority to investigate the existence of violations accordingly included authority to investigate coverage. Cf. Endicott Johnson Corp. *v.* Perkins, 317 U. S. 501; Myers *v.* Bethlehem Corp., 303 U. S. 41, discussed in the text herein at notes 49-51; and authorities cited in note 32 *supra.*

[48] The description was made with all of the particularity the nature of the inquiry and the Administrator's situation would permit. See note 46. The subpoenas were limited to the books, papers and documents of the respective

cations more than meet the requirements long established by many precedents.

More recent confirmation of those rulings may be found in *Endicott Johnson Corp.* v. *Perkins, supra,* and *Myers* v. *Bethlehem Corp.*, 303 U. S. 41. It is true that these cases involved different statutes substantially and procedurally. But, notwithstanding the possible influence of the doctrine of governmental immunity to suit in the *Endicott Johnson* case, it would be anomalous to hold that under the Walsh-Healy Act, 49 Stat. 2036, the District Court was not authorized to decide the question of coverage or, on the basis of its adverse decision, to deny enforcement to the Secretary's subpoena seeking relevant evidence on that question, because Congress had committed its initial determination to him; and at the same time to rule that Congress could not confer the same power upon the Administrator with reference to violations of the Fair Labor Standards Act.[49] The question at issue is not in either case the nature of the legal obligation violation of which the evidence is sought to show. It is rather whether evidence relevant to the violation, whatever the obligation's character, can be drawn forth by the exercise of the subpoena power.

The *Myers* case did not involve a *subpoena duces tecum*, but was a suit to enjoin the National Labor Relations Board from holding a hearing upon a complaint against an employer alleged to be engaged in unfair labor practices forbidden by the Wagner Act, 49 Stat. 449. The hearing required an investigation and determination of coverage, involving as in this case the question whether the company was engaged in commerce. It denied this upon allegations thought to sustain the denial, as well as the futility, expensiveness and vexatious character of the hearing to itself.[50] This Court held that the District Court was without

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corporations, to which alone they were addressed. They required production at specified times and places in the cities of publication and stated the purpose of the investigation to be one affecting the respondent, pursuant to the provisions of §§ 9 and 11(c), "regarding complaints of violations by said company of Sections 6, 7, 11(c), 15(a), 15(a)(2) and 15(a)(5) of the Act." Cf. the authorities cited in notes 32 and 45.

[49] This Court, in granting certiorari in the *Endicott Johnson* case, did so, among other reasons, "because of probable conflict with" General Tobacco & Grocery Co. *v.* Fleming, 125 F. 2d 596, a case arising under the Fair Labor Standards Act. 317 U. S. at 502.

[50] To the argument of "irreparable damage," the Court said:

"The contention is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. . . .

jurisdiction to enjoin the hearing. Regarding as appropriate the procedure before the Board and as adequate the provisions for judicial review of its action, including its determination of coverage, the Court sustained the exclusive judisdiction of the Board, and of the Court of Appeals upon review, to determine that question, with others committed to their judgment, in the statutory proceeding for determining whether violations of the Act exist. The opinion referred to the Board's subpoena power, also to its authority to apply to a District Court for enforcement, and stated that "to such an application appropriate defense may be made." But the decision's necessary effect was to rule that it was not "an appropriate defense" that coverage had not been determined prior to the hearing or, it would seem necessarily to follow, prior to the Board's preliminary investigation of violation. If this is true in the case of the Board, it would seem to be equally true in that of the Administrator.[51]

In these results under the later as well as the earlier decisions the basic compromise has been worked out in a manner to secure the public interest and at the same time to guard the private ones affected against the only abuses from which protection rightfully may be claimed. The latter are not identical with those protected against invasion by actual search and seizure, nor are the threat-

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Obviously the rule . . . cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact." 303 U. S. at 50.

[51] It is true that in the *Myers* situation the Board's determination is quasi-judicial, is given finality as to the facts if there is evidence to sustain its findings, National Labor Relations Act, § 10(e) (49 Stat. 454), and is expressly made exclusive, *ibid.*, § 10(a), whereas in the situations now presented the Administrator's investigation is only preliminary to instituting proceedings in court and thus has none of the finality or quasi-judicial character given to the Board's determination. But, as the Court noted, the Board also has preliminary investigative authority, incidental to preparation for the hearing, to which its subpoena power applies, National Labor Relations Act, § 11 (49 Stat. 455, 456); and, as we have said, if the courts are forbidden to determine coverage prior to the Board's quasi-judicial proceeding for deciding that question, it would seem necessarily to follow that they are forbidden also to decide it prior to the Board's preliminary investigation to determine whether the proceeding shall be instituted.

The mere fact that the first stage of formal adjudication is administrative in the one case and judicial in the other would seem to make no difference with the power of Congress to authorize either the preliminary investigation or the use of the subpoena power in aid of it.

ened abuses the same. They are rather the interests of men to be free from officious intermeddling, whether because irrelevant to any lawful purpose or because unauthorized by law, concerning matters which on proper occasion and within lawfully conferred authority of broad limits are subject to public examination in the public interest. Officious examination can be expensive, so much so that it eats up men's substance. It can be time consuming, clogging the processes of business. It can become persecution when carried beyond reason.

On the other hand, petitioners' view if accepted would stop much if not all of investigation in the public interest at the threshold of inquiry and, in the case of the Administrator, is designed avowedly to do so. This would render substantially impossible his effective discharge of the duties of investigation and enforcement which Congress has placed upon him. And if his functions could be thus blocked, so might many others of equal importance.

We think, therefore, that the Courts of Appeals were correct in the view that Congress has authorized the Administrator, rather than the District Courts in the first instance, to determine the question of coverage in the preliminary investigation of possibly existing violations; in doing so to exercise his subpoena power for securing evidence upon that question, by seeking the production of petitioners' relevant books, records and papers; and, in case of refusal to obey his subpoena, issued according to the statute's authorization, to have the aid of the District Court in enforcing it. No constitutional provision forbids Congress to do this. On the contrary, its authority would seem clearly to be comprehended in the "necessary and proper" clause, as incidental to both its general legislative and its investigative powers.

IV.

What has been said disposes of petitioners' principal contention upon the sufficiency of the showing. Other assignments, however, present the further questions whether any showing is required beyond the Administrator's allegations of coverage and relevance of the required materials to that question; and, if so, of what character. Stated otherwise they are whether the court may order enforcement only upon a finding of "probable cause," that is, probability in fact, of coverage, as was held by the Court of Appeals for the Tenth Circuit in No. 61; following the lead of the

Eighth Circuit in *Walling* v. *Benson*, 137 F. 2d 501, or may do so upon the narrower basis accepted by the Third Circuit in No. 63.

The showing in No. 61 was clearly sufficient to constitute "probable cause" in this sense under conceptions of coverage prevailing at the time of the hearing,[52] whether or not that showing was necessary. Accordingly the judgment in that case must be affirmed.

In No. 63 the showing was less extensive, and it is doubtful that it would constitute "probable cause" of coverage as that term was used in the decisions from the Tenth and Eighth Circuits.[53] The Court of Appeals for the Third Circuit did not so label it, but held the showing sufficient.

Congress has made no requirement in terms of any showing of "probable cause";[54] and, in view of what has already been said, any possible constitutional requirement of that sort was satisfied by the Administrator's showing in this case, including not only the allegations concerning coverage, but also that he was proceeding with his investigation in accordance with the mandate of Congress and that the records sought were relevant to that purpose. Actually, in view of today's ruling in *Mabee* v. *White Plains Pub.*

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[52] The evidence that the company or its employees were engaged in commerce, etc., was supplied largely by it in the return to the rule to show cause and the supporting affidavits, consisting of admissions and statements of fact concerning its modes of doing business. The admissions obviously were made upon petitioner's broad theory that the publishing business is not subject to the Act or to the commerce power. But those conclusions do not nullify the factual character of the admissions and, so taken, they adequately sustain the appellate court's conclusion of "probable cause" of coverage.

[53] See notes 3, 4. The Administrator's allegations, more general than in No. 61, merely set forth that the company was a newspaper publisher, that the Administrator had reason to believe it was violating the Act, and that it was "engaged in commerce and in the production of goods for commerce." This conclusion was denied. The admissions of the return, including the affidavits, supplied only the pertinent facts in relation to coverage that the respondent, News Printing Co., was engaged in the business of publishing and distributing the "Paterson Evening News," a daily paper, that less than one per cent of its circulation of more than 23,000 copies, or a daily average of 278 copies, was distributed outside New Jersey, where the paper was published, and that the business was conducted in the same manner as other "local" papers according to the methods shown by the affidavits. These disclosed nothing material concerning interstate phases of such businesses generally, except as might be inferred from statements that they publish national and international as well as local news, and must do so as quickly as possible after the events occur.

[54] Section 9 of the Federal Trade Commission Act authorizes the Administrator to invoke the aid of the court "in case of disobedience of the subpoena" and the court is authorized to give assistance "in case of contumacy or refusal to obey a subpoena issued to any corporation or other person." Cf. note 24.

Co., supra, the showing here, including the fact supplied by the response, was sufficient to establish coverage itself, though that was not required.

The result therefore sustains the Administrator's position that his investigative function, in searching out violations with a view to securing enforcement of the Act, is essentially the same as the grand jury's, or the court's in issuing other pretrial orders for the discovery of evidence,[55] and is governed by the same limitations. These are that he shall not act arbitrarily or in excess of his statutory authority, but this does not mean that his inquiry must be "limited . . . by forecasts of the probable result of the investigation . . ." *Blair* v. *United States*, 250 U. S. 273, 282; cf. *Hale* v. *Henkel*, 201 U. S. 43. Nor is the judicial function either abused or abased, as has been suggested,[56] by leaving to it the determination of the important questions which the Administrator's position concedes the courts may decide.[57]

Petitioners stress that enforcement will subject them to inconvenience, expense and harassment. That argument is answered fully by what was said in *Myers* v. *Bethlehem Corp.*[58] There is

[55] The bill of discovery in equity would seem to furnish an instance. Cf. Sinclair Refining Co. v. Jenkins Petroleum Co., 289 U. S. 689, 696-697. See also the provisions for pretrial examination and the taking of depositions, Federal Rules of Civil Procedure, Rules 26(b), 30(d), 45; Union Central Life Ins. Co. v. Burger, 27 F. Supp. 556; Bloomer v. Sirian Lamp Co., 8 F. R. S. 26b.31, Case 3; Lewis v. United Air Lines Transport Corp., 27 F. Supp. 946, 947. The power of Congress itself to call for information presents a related illustration. McGrain v. Daugherty, 273 U. S. 135, 156-158.

[56] In General Tobacco & Grocery Co. v. Fleming, 125 F. 2d 596, 599, the court said: "In the exercise of the judicial power to review questions of law, as conferred by an Act of Congress, the seal of a United States Court should not become a mere rubber stamp for the approval of arbitrary action by an administrative agency." In this case, No. 63, the District Court said: ". . . the functions of the courts remain, and those functions are not merely to act as an adjunct of administrative bodies. . . ." 49 F. Supp. 659, 661.

[57] The issues of authority to conduct the investigation, relevancy of the materials sought, and breadth of the demand are neither minor nor ministerial matters. Nor would there be any failure to satisfy fully the discretionary power implied in the statute's use of the word "may," rather than "shall," see note 24, in authorizing the court to enforce the subpoenas. It would be going far to say that Congress could not proceed upon this basis, but could go forward only by requiring a showing of probable cause of coverage in the sense of probability in fact of coverage. Cf. note 44 and text. Coverage is but one element in violation and if probable cause, in that sense, must be shown concerning it, it is difficult to understand why probable cause must not be shown also concerning exemptions, see Martin Typewriter Co. v. Walling, 135 F. 2d 918; Walling v. LaBelle S. S. Co., 148 F. 2d 198, or any other essential element in violation.

[58] See note 50 *supra*.

no harassment when the subpoena is issued and enforced according to law. The Administrator is authorized to enter and inspect, but the Act makes his right to do so subject in all cases to judicial supervision. Persons from whom he seeks relevant information are not required to submit to his demand, if in any respect it is unreasonable or overreaches the authority Congress has given. To it they may make "appropriate defense" surrounded by every safeguard of judicial restraint. In view of these safeguards, the expressed fears of unwarranted intrusions upon personal liberty are effective only to recall Mr. Justice Cardozo's reply to the same exaggerated forebodings in *Jones* v. *Securities and Exchange Commission*: "Historians may find hyperbole in the sanguinary simile."[59]

Nor is there room for intimation that the Administrator has proceeded in these cases in any manner contrary to petitioners' fundamental rights or otherwise than strictly according to law. It is to be remembered that petitioners' are not the only rights which may be involved or threatened with possible infringement. Their employees' rights and the public interest under the declared policy of Congress also would be affected if petitioners should enjoy the practically complete immunity they seek.

No sufficient reason was set forth in the returns or the accompanying affidavits for not enforcing the subpoenas, a burden petitioners were required to assume in order to make "appropriate defense."

Accordingly the judgments in both causes, No. 61 and No. 63, are

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of these cases.

[59] See note 30.

SUPREME COURT OF THE UNITED STATES.

Nos. 61, 63.—October Term, 1945.

Oklahoma Press Publishing Company, Petitioner, 61 *vs.* L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.
News Printing Co., Inc., Petitioner, 63 *vs.* L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[February 11, 1946.]

Mr. Justice Murphy, dissenting.

It is not without difficulty that I dissent from a procedure the constitutionality of which has been established for many years. But I am unable to approve the use of non-judicial subpoenas issued by administrative agents.

Administrative law has increased greatly in the past few years and seems destined to be augmented even further in the future. But attending this growth should be a new and broader sense of responsibility on the part of administrative agencies and officials. Excessive use or abuse of authority can not only destroy man's instinct for liberty but will eventually undo the administrative processes themselves. Our history is not without a precedent of a successful revolt against a ruler who "sent hither swarms of officers to harass our people."

Perhaps we are too far removed from the experences of the past to appreciate fully the consequences that may result from an irresponsible though well-meaning use of the subpoena power. To allow a non-judicial officer, unarmed with judicial process, to demand the books and papers of an individual is an open invitation to abuse of that power. It is no answer that the individual may refuse to produce the material demanded. Many persons

have yielded solely because of the air of authority with which the demand is made, a demand that cannot be enforced without subsequent judicial aid. Many invasions of private rights thus occur without the restraining hand of the judiciary ever intervening.

Only by confining the subpoena power exclusively to the judiciary can there be any insurance against this corrosion of liberty. Statutory enforcement would not thereby be made impossible. Indeed, it would be made easier. A people's desire to cooperate with the enforcement of a statute is in direct proportion to the respect for individual rights shown in the enforcement process. Liberty is too priceless to be forfeited through the zeal of an administrative agent.